United States Court of Appeals for the Second Circuit

APPENDIX

ORIGINAL WITH PROOF OF SERVICE

77-6179

B P/S

FILED
DEC 20 1977

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

EARL P. HOPPER, JR., by his father and next friend, EARL P. HOPPER, SR.; MICHAEL J. BOSILJEVAC, by his wife, next friend and Conservator-Guardian, MARY K. BOSILJEVAC; ROBERT A. BRETT, JR., by his father, next friend and Guardian-Conservator, ROBERT A. BRETT, SR.; NICHOLAS G. BROOKS, by his father and next friend, GEORGE L. BROOKS; SHELDON D. SCHULTZ, by his father, next friend and Trustee (Guardian), GEORGE A. SCHULTZ; DONALD E. SHAY, JR., by his father, next friend and Guardian, DONALD E. SHAY, SR.; JONATHAN B. BEDNAREK, by his father and next friend, JOHN BEDNAREK; VINCENT A. CHIARELLO, by his mother and next friend, ANNE CHIARELLO; JOSEPH PETER FANNING, by his wife and next friend, LINDA FANNING; PAUL O. MEDER, by his wife and next friend, JANE M. MEDER; JOHN F. O'GRADY, by his father and next friend, JOHN M. O'GRADY; LEONARD ROBERTSON, by his father and next friend, STRUAN ROBERTSON; PHILIP CRAIG, by his brother and next friend, JOHN P. CRAIG; BRENT E. DAVIS, by his father and next friend, RUSSELL H. DAVIS, JR.; HARLEY H. HALL, by his wife and next friend, MARY LOUISE HALL; DONALD F. LINDLAND, by his wife and next friend, BARBARA ANN LINDLAND; JAMES M. ROZO, by his father and next friend, SAMUEL ROZO; CHARLES E. SHELTON, by his wife and next friend, DOROTHY M. SHELTON; ROBERT L. STANDERWICK, by his wife and next friend, CAROLYN STANDERWICK; MICHAEL B. VARNADO, by his father, next friend and Curator (Guardian), HOUSLEY VARNADO; and MILTON J. VESCELIUS, by his wife and next friend, JEANENE VESCELIUS,

Plaintiffs-Appellants,

-against-

JAMES E. CARTER, JR., President of the United States; HAROLD S. BROWN, Secretary of Defense; JOHN C. STETSON, Secretary of the Air Force; CLIFFORD L. ALEXANDER, Secretary of the Army; and W. GRAHAM CLAYTOR, JR., Secretary of the Navy,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOINT APPENDIX

(Volume I of II -- Pages A-1 - A-464)

KAPLAN, KILSHEIMER & FOLEY
Attorneys for Plaintiffs-Appellants
122 East 42nd Street
New York, New York 10017

DAVID G. TRAGER
United States Attorney, Eastern District of New York
Attorney for Defendants-Appellees
225 Cadman Plaza East
Brooklyn, New York 11201

PAGINATION AS IN ORIGINAL COPY

INDEX

Page

DOCKET ENTRIES A-1

COMPLAINT A-5

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER A-34

AFFIDAVIT OF DERMOT G. FOLEY, ESQ., FOR PLAINTIFFS, IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION A-36

- EXHIBIT "A" TO FOLEY AFFIDAVIT - STATEMENT OF FACTS STIPULATED TO BY THE PARTIES AND OF CONTESTED FACTS IN CASE ENTITLED McDONALD v. McLUCAS A-56
- EXHIBIT "B" TO FOLEY AFFIDAVIT - REGULATIONS OF THE THREE SERVICES A-67
- EXHIBIT "C" TO FOLEY AFFIDAVIT - LETTER DATED AUGUST 25, 1977 SENT TO NEXT OF KIN OF AIR FORCE MIA's A-77
- EXHIBIT "D" TO FOLEY AFFIDAVIT - AFFIDAVIT OF STEPHEN FRANK SWORN TO MARCH 13, 1974 IN CASE ENTITLED McDONALD v. McLUCAS A-80

NOTICE OF CROSS-MOTION TO DISMISS UNDER RULE 12(b) A-82

DECLARATION OF WALTER SLOCOMBE, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION A-83

- EXHIBIT TO SLOCOMBE DECLARATION - NEWS RELEASE DATED AUGUST 18, 1977 A-90

STATEMENT OF FRANK A. SIEVERTS, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION A-92

- EXHIBIT TO SIEVERTS STATEMENT - DEPARTMENT OF STATE TELEGRAM A-94

INDEX

	Page
EXHIBIT TO SIEVERTS STATEMENT - EXCERPTS FROM HEARINGS BEFORE THE SUBCOMMITTEE ON ASIAN AND PACIFIC AFFAIRS OF THE COMMITTEE ON INTERNATIONAL RELATIONS, HOUSE OF REPRESENTATIVES	A-96
AFFIDAVIT OF COLONEL A. W. GRATCH, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION	A-99
ATTACHMENT (1) TO GRATCH AFFIDAVIT - DISCLOSURE OF DECISION FORM	A-103
ATTACHMENT (2) TO GRATCH AFFIDAVIT - DEPARTMENT OF THE AIR FORCE REGULATION 35-4[illegible]	A-104
ATTACHMENT (3) TO GRATCH AFFIDAVIT - STATISTICS	A-106
AFFIDAVIT OF MAJOR MATT J. MARSHALL, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION	A-107
ATTACHMENT (1) TO MARSHALL AFFIDAVIT - NAVY DEPARTMENT REGULATIONS	A-111
ATTACHMENT (2) TO MARSHALL AFFIDAVIT - LETTER APPOINTING MARSHALL HEARING OFFICER	A-114
ATTACHMENT (3) TO MARSHALL AFFIDAVIT - HEARING OFFICER'S GUIDE	A-117
DECLARATION OF MAJOR WILLIAM L. ENGLAND, JR., FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION	A-122
ATTACHMENT (1) TO ENGLAND DECLARATION - ARMY REGULATION 600-10	A-126
ATTACHMENT (2) TO ENGLAND DECLARATION - NOTICE OF STATUS REVIEW AND HEARING RIGHTS	A-139
AFFIDAVIT OF COMMANDER JOHN G. COLGAN, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION	A-141
ATTACHMENT (1) TO COLGAN AFFIDAVIT - AUTHORITY DELEGATED TO PERS-OG BY SECRETARY OF THE NAVY	A-145

INDEX

		Page
ATTACHMENT (2) TO COLGAN AFFIDAVIT - LETTER APPOINTING COLGAN HEARING OFFICER		A-146
ATTACHMENT (3) TO COLGAN AFFIDAVIT - NAVY REGULATIONS FOR HOLDING HEARINGS		A-147
ATTACHMENT (4) TO COLGAN AFFIDAVIT - HEARING OFFICERS GUIDE		A-150
ATTACHMENT (5) TO COLGAN AFFIDAVIT - STATISTICS		A-156
AFFIDAVIT OF CAPTAIN RAYMOND A. VOHDEN, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION		A-157
AFFIDAVIT OF JOAN VINSON, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION		A-160
EXHIBIT TO VINSON AFFIDAVIT - LETTER FROM JOAN VINSON TO THE PRESIDENT DATED OCTOBER 24, 1974		A-162
AFFIDAVIT OF DERMOT G. FOLEY, ESQ., FOR PLAINTIFFS, IN OPPOSITION TO CROSS-MOTION AND IN SUPPORT OF MOTION		A-251
EXHIBIT A TO FOLEY AFFIDAVIT - TRANSCRIPT OF ARTICLE BY GAVIN LETTS		A-261
EXHIBIT B TO FOLEY AFFIDAVIT - LEAGUE ANALYSIS OF COMMITTEE REPORT		A-271
AFFIDAVIT OF MARY K. BOSILJEVAC, FOR PLAINTIFFS, IN OPPOSITION TO CROSS-MOTION		A-298
TRANSCRIPT OF TRIAL		A-301
Plaintiffs' Witnesses:		
Dermot G. Foley	Direct	A-305
	Cross	A-326
Bessie Sue Wallace Sullivan	Direct	A-329

INDEX

		Page
John M. O'Grady	Direct	A-331
Mary Kathleen Veys Bosiljevac	Direct	A-337
George L. Brooks	Direct	A-435
Carol Linda Bates	Direct	A-470
	Cross	A-480
	Redirect	A-481
Colonel Archie William Gratch	Direct	A-489
Commander John G. Colgan	Direct	A-607
	Cross	A-623
Major Nat J. Marshall	Direct	A-625
	Cross	A-627
Major William L. England, Jr.	Direct	A-629
Captain Raymond A. Vohden	Direct	A-635 A-717
Frank A. Sieverts	Direct	A-644
	Cross	A-676
Karen L. Martin	Direct	A-684
	Cross	A-707
	Redirect	A-714

Plaintiffs' Exhibits:

4	Letter from Colonel A. W. Gratch to Mr. & Mrs. John M. O'Grady dated 24 Feb 1977	In evidence	A-334
		Reproduced	A-753
5	Letter from Captain Theodore E. Brom, Jr. to Mr. John O'Grady dated 7 Mar 1977	In evidence	A-334
		Reproduced	A-754

INDEX

			Page
6	Letter from Colonel J. G. Luther to Mrs. Michael J. Bosiljevac dated 30 Sep 1973	In evidence	A-340
		Reproduced	A-757
7	Document dated September 24, 1973 entitled "Subject: Continuation of Missing in Action Status Beyond Twelve Months"	In evidence	A-342
		Reproduced	A-759
8	Letter from Major General L. W. Svendsen, Jr. to Mrs. Michael J. Bosiljevac dated 16 August 1977	In evidence	A-351
		Reproduced	A-762
9	Memo from Major Theodore E. Brom, Jr. to Mrs. Michael Bosiljevac dated 19 Aug 77 and attached Summary of Facts and Circumstances	In evidence	A-353
		Reproduced	A-765
10	Letter from Colonel A. W. Gratch to Mrs. Michael J. Bosiljevac dated 25 Aug 1977	In evidence	A-355
		Reproduced	A-768
12	Article appearing in New York Times, September 30, 1972	In evidence	A-363
		Reproduced	A-771
13	Letter from Captain Gary L. Rosevold to Mrs. Michael J. Bosiljevac dated 23 Aug 1973	In evidence	A-365
		Reproduced	A-772
14	Statement of Captain Robert J. Pettit, Jr.	In evidence	A-375
		Reproduced	A-776
15	Statement of Captain H. H. Hayslett, Jr.	In evidence	A-376
		Reproduced	A-777

INDEX

			Page
16	Casualty Documentation Record of Captain Michael J. Bosiljevac	In evidence Reproduced	A-419 A-778
17	Transcript of Debriefing of LTC James W. O'Neil	In evidence Reproduced	A-421 A-779
18	Message Form dated 1 Oct 72	In evidence Reproduced	A-425 A-785
19	Message Form	In evidence Reproduced	A-427 A-786
21	Letter from Louis E. Foster to Mrs. Mary K. Bosiljevac dated 7 Sep 1977	In evidence Reproduced	A-432 A-787
22	Document dated February 4, 1970 entitled "Subject: 2 Jan 70 Rescue Attempt of Milestone 507	In evidence Reproduced	A-437 A-788
23	Pages 134, 215 and 217 of booklet	In evidence Reproduced	A-448 A-789
24	Letter from George L. Brooks to Director of Freedom of Information Requests dated March 9, 1977	In evidence Reproduced	A-452 A-790
25	Letter from Peter P. Uzon to George L. Brooks dated 24 Aug 1977	In evidence Reproduced	A-461 A-791
26	Script from Department of Defense Briefing to Members of Woodock Commission	In evidence Reproduced	A-473 A-793
27	Rules and Security Regulations of Select Committee on Missing Persons in Southeast Asia	In evidence Reproduced	A-476 A-813

INDEX

Page

28 Letter from Dermot G. Foley, Esq. to Congressman James Lloyd dated January 5, 1976
In evidence A-477
Reproduced A-822

29 Letter from Congressman Jim Lloyd to Dermot G. Foley dated January 13, 1977
In evidence A-477
Reproduced A-824

Defendants' Exhibit:

*A Affidavit of Melissa Hogan Reproduced A-826

Court's Exhibit:

*2 Plaintiffs' Supplemental Pre-Trial Memorandum Reproduced A-830

ORDER OF WEINSTEIN, J. DATED SEPTEMBER 23, 1977 APPEALED FROM A-844

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED SEPTEMBER 28, 1977 APPEALED FROM A-846

NOTICE OF APPEAL A-854

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM IN THE SUPREME COURT OF THE UNITED STATES IN CASE ENTITLED McDONALD v. McLUCAS A-855

APPELLEES' MOTION TO AFFIRM IN THE SUPREME COURT OF THE UNITED STATES IN CASE ENTITLED McDONALD v. McLUCAS A-889

AFFIDAVIT OF RUSSELL DAVIS, JR. A-912

AFFIDAVIT OF MARY K. BOSILJEVAC A-917

---

*Although these exhibits were stamped admitted in evidence by the stenographer, no notation of their admission was made by the stenographer in the transcript of the trial.

A-1

DOCKET ENTRIES

DIST/OFFICE	YR.	NUMBER	MO.	DAY	YEAR	APPEAL				R 23	$	OTHER	JUDGE NUMBER	JURY DEM.	YR.	NUMBER
297/1	77	1793	09	02	77	3	440	1		X			0715 WEINSTEIN.			

PLAINTIFFS

HOPPER, EARL P. Jr. et al

DEFENDANTS

CARTER, JAMES E. Jr. Pres.of U.S. et al

EARL P., HOPPER, JR., by his father and next friend, EARL P. HOPPER, SR.; MICHAEL J. BOSILJEVAC, by his wife, next friend and Conservator-Guardian, MARY K. BOSILJEVAC; ROBERT A. BRETT, JR., by his father, next friend and Guardian Conservator, ROBERT A. BRETT, SR.; NICHOLAS G. BROOKS, by his father and next friend, GEORGE L. BROOKS; SHELDON D. SCHULTZ, by his father, next friend and Trustee (Guardian), GEORGE A. SCHULTZ; DONALD E. SHAY, JR., by his father, next friend and Guardian, DONALD E. SHAY, SR.,; JONATHAN B. BEDNAREK, by his father and next friend, JOHN BEDNAREK; VINCENT A. CHIARELLO, by his mother and next friend, ANNE CHIARELLO; JOSEPH PETER FANNING, by his wife and next friend, LINDA FANNING; PAUL O. MEDER, by his wife and next friend, JANE M. MEDER; JOHN F. O'GRADY, by his father and next friend, JOHN M. O'GRADY, LEONARD ROBERTSON, by his father and next friend, STRUAN ROBERTSON; PHILIP CRAIG, by his brother and next friend, JOHN P. CRAIG; BRENT E. DAVIS, by his father and next friend, RUSSELL H. DAVIS, JR.; HARLEY H. HALL, by his wife and next friend, MARY LOUISE HALL; DONALD F. LINDLAND, by his wife and next friend, BARBARA ANN LINDLAND; JAMES M. ROZO, by his father and next friend, SAMUEL ROZO; CHARLES E. SHELTON, by his wife and next friend, DOROTHY M. SHELTON; ROBERT L. STANDERWICK, by his wife and next friend, CAROLYN STANDERWICK; MICHAEL B. VARNADO, by his father, next friend and Curator (Guardian), HOUSLEY VARNADO; and MILTON J. VESCELIUS, by his wife and next friend, JEANENE VESCELIUS,

Plaintiffs,

-against-

. CARTER, JR., President of the States; HAROLD S. BROWN, Secretary nse; JOHN C. STETSON, Secretary of Force; CLIFFORD L. ALEXANDER, ry of the Army; and W. GRAHAM CLAYTO cretary of the Navy,

Defendants.

e ofmandamus to compel officers wed to pltff's & pltff. class., & void .

A TRUE COPY
ATTEST
DATED Dec. 23 1977
LEWIS ORGEL
CLERK
BY Stanley Kessler
DEPUTY CLERK

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS-5	
				JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/7

A-2

R 23	DEMAND $	OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	NUMBER
X			0715			

WEINSTEIN, J.

DEFENDANTS

CARTER, JAMES E. Jr. Pres. of U.S.
et al

-against-

CARTER, JR., President of the United States; HAROLD S. BROWN, Secretary of Defense; JOHN C. STETSON, Secretary of the Air Force; CLIFFORD L. ALEXANDER, Secretary of the Army; and W. GRAHAM CLAYTO JR., Secretary of the Navy,

Defendants.

CAUSE

28 USC 1331 , 28 USC 1361
OTHER CIVIL RTS.- The action is in the nature of mandamus to compel officers or employees of the U.S. to perform duties owed to pltff's & pltff. class., to declare 37 USC 555 & 556 unconstitutional & void .
SEEKS- Preliminary & permanent INJUNCTION
RELATED CASE- (77-C-1784 WEINSTEIN, J.)

ATTORNEYS

For Pltff.:
KAPLAN, KILSHEIMER & FOLEY
122 East 42nd Street
NY, NY 10017
(MU. 7-1980)
by Dermot G.Foley

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS

FILING FEES PAID

DATE	RECEIPT NUMBER	C.D. NUMBER

STATISTICAL CARDS

CARD	DATE MAILED
JS-5	
JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/7

77 C 1799 EARL P. HOPPER, JR. et al -v- JAMES E. CARTER, JR. e

DATE	NR.	PROCEEDINGS
9/2/77		Complaint filed, summons issued. (1)
9/12/77		By Weinstein , J Order dtd 9/11/77 filed re that a temporary restraing order is granted enjoining defts and .. their designees from conduction any further proceedings etc.jj 2)
9-12-77		Before WEINSTEIN,J- Case called. TRO signed. 9-7-77. TRO applies to that class of MIAS not actively defended by ~~a~~ next of kin. Pre-Trial conference held & concluded. Trial set for 9-19-77. mg --
9-12-77		By WEINSTIEN,J-Civil pre trial order dtd 9-12-77 filed. mg (3)
9-12-77		By WEINSTEIN,J-Order dtd 9-12-77 that the tro granted 9-7-77 is modified to allow deft Secretary of the Air Force to make a determination under 37 USC 555 and 556 with respect to Lt. Col. Bobby G. Vinson. mg (4)
9-15-77		Before WEINSTEIN, J. - Case called. Pre-trial conference held and concluded. Trial set for 9-19-77 at 10 A.M. mm
9/19/77		Letter filed to Judge Weinstein from Mrs. Sondra R. Bors, dtd 9/13/77, re:reconsideration of injunction of MIA's. tk (5)
9/19/77		Motion for exclusion from class action filed.jj (6)
9/19/77		Before Weinstein. J-case called-trial ordered & begun-non jury-govt's motion to dismiss-decision reserved-trial contd to 9/20/77-TRO renewed for.duration of trial.jj
9/21/77		Before Weinstein, J-case called-trial resumed-application of Kathryn Lockort is granted-trial contd to 9/23/77.jj
9/26/77		By Weinstein, J Order dtd 9/23/77 filed re that pltff's motion for a preliminary injunction is denied, and that the deft's motion to dismiss is denied and that the defts are directed to make a motion for summary within 30 days of the entry of this order, within which time pltffs may take the deposition of Roger Shields etc.jj (7)
9-23-77		Before WEINSTEIN, J. - Case called. Trial resumed. Pltff rests. Govt's motion to dismiss. Decision reserved. Govt to file summary judgment motion within 30 days. Pltff's motion for TRO & preliminary injunction is denied. TRO extended to 9-27-77 at 5 P.M. - The Court's findings of fact & conclusions of law read into record. Govt to submit order. mm
9-27-77		Stenographer's transcript dtd 9-23-77 filed. mm (8)
9-29-77		By WEINSTEIN J.--MEMORANDUM AND ORDER dtd 9-28-77 filed that the pltffs may continue deposition, and instructing the U.S. to make a motion for summary judgment within 30 days, etc. ld (9)
9/30/77		Pltff's notice to take deposition of DR. ROGER SHIELDS as witness (hostile to pltffs) in WASHINGTON, D.C. on 10/6/77 filed. (10)
9/30/77		Stenographer's transcript dtd 9/19/77. 9/20/77, & 9/21/77,filed. (11 to 13)
10/4/77		Copy of letter of WEINSTEIN, J. to Gladys Brooks dtd 9/29/77. IN RE: Enclosure of MEMORANDUM based upon oral findings. filed. (14)
0/6/77		Summons returned and filed, executed. (15)
10/17/77		Copy of letter to Weinstein,J.,from Elaine C. Buck,Assist.U.S.Atty., requesting vacate of prior order requiring filing of a motion for summary judgement, and rendering a final judgement in this action based on record to date and Shields deopsition filed.jm (16)
10/18/77		Letter filed to Judge Weinstein from Elaine C. Buck dtd 10/13/77 re: denial of pltffs motion for a preliminary injunction. tk (17)
10/18/77		Letter filed to Judge Weinstein from Dermot G. Foley dtd 10/14/77, re:response to letter received by counsel on a motion for summary judgment. t k (18)

EARL P. HOPPER, Jr. et al -v- JAMES E. CARTER, Jr. et al

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
EARL PL HOPPER JR. et al	JAMES E. CARTER Jr. Pres. of U.S. et al	DOCKET NO. 77-C-1793 PAGE ____ OF ____ PAGES

DATE	NR.	PROCEEDINGS
10/26/77		Pltff's Notice of Appeal to U.S. C of A, dtd 10/25/77, filed~~.jm~~ (19) Docket entries and copy of Notice of Appeal mailed to C of A.jm
10/31/77		Notice of motion (deft's) for order dismissing action for failure to state claim upon which relief can be granted or for summary judgement in favor of defts, with statement of material facts as to which there is no genuine issue to be tried, and memorandum supporting motion, filed.jm (20, 21, 22)
11-10-77		By WEINSTEIN,J.- Order dtd. 11-7-77 adjd of ret. date of motion from 11-9-77 to 11-16-77 filed. fy (23)
11/16/77		Before WEINSTEINJ- Case called. Both sides present. Defts motion to dismiss and for summary judgments argued. Govt & Pltff to arrange phone conversation between Dr. Shields & Court. Stay is ~~xxxxxxx~~ denied pending appeal. tk
11/16/77		Statement of material facts which appear to be at issue, filed. tk (24)
11-18-77		Pltff's notice of cross-motion and memo of law filed. fy (25/26)
11-18-77		Affidavit of D. Foley in opposition to defts cross-motion to dismiss filed. fy (27)
11-18-77		Affidavit if M. Bosiljevac in response to defts motion to dismiss filed. (28)
11-18-77		Pltff's second supp. mmeo of law in support of perliminary injunction filed. (29_
11-18-77		Unsigned order to show cause filed. fy (30)
11-18-77		Memo of law in support of pltff's application for TRO filed. fy (31)
11-18-77		Defts notice of cross-motion to dismiss filed. fy (32)
11/21/77		Memorandum of law supporting defts cross-motion to dismiss, filed.jm (33)
11/23/77		By Weinstein,J.-Order dtd 11/23/77 that pages 1-22 of transcript of hearing on 9/19/77 are amended and shall be deemed to read as whoen on attached copies included, filed.jm (34)
11/25/77		AFFIDAVIT OF RUSSELL DAVIS, Jr. (Father of Brent E. Davis, a missing-in-action serviceman who is a pltff. in this action)filed. (35) lg.
11/25/77		AFFIDAVIT of Mary K. Bosiljevac (testified as witness in an evidentiary hearing in this action on pltff's motion for preliminary injunction & deft's motion for dismissal) filed. (36) lg
11/25/77		RECORD ON APPEAL CERTIFIED and Hand Delivered by Dermot G. Foley (Atty. for Pltff's) at 4:30 , today, to Court of Appeals. lg.
11/29/77		Acknowledgement of receipt of file on appeal received from C of A, filed.jm (37)
11/29/77		SUPPLEMENTAL RECORD ON APPEAL (Only Exhibits) mailed to Court of Appeals. lg.
12/6/77		Affidavit of Colonel A.W. Gratch filed sg 38
12/8/77		Supplemental Index on Appeal from C of A, ~~filed.j~~macknowledging receipt of file on appeal, filed.jm (39)
12-9-77		Sten. transcript dtd 11-16-77 filed. mg (40)

COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EARL P. HOPPER, JR., by his father and
next friend, EARL P. HOPPER, SR.;
MICHAEL J. BOSILJEVAC, by his wife,
next friend and Conservator-Guardian,
MARY K. BOSILJEVAC; ROBERT A. BRETT,
JR., by his father, next friend and Guardian-
Conservator, ROBERT A. BRETT, SR.;
NICHOLAS G. BROOKS, by his father and
next friend, GEORGE L. BROOKS; SHELDON
D. SCHULTZ, by his father, next friend
and Trustee (Guardian), GEORGE A. SCHULTZ;
DONALD E. SHAY, JR., by his father, next
friend and Guardian, DONALD E. SHAY, SR.,;
JONATHAN B. BEDNAREK, by his father and
next friend, JOHN BEDNAREK; VINCENT A.
CHIARELLO, by his mother and next friend,
ANNE CHIARELLO; JOSEPH PETER FANNING, by
his wife and next friend, LINDA FANNING;
PAUL O. MEDER, by his wife and next friend,
JANE M. MEDER; JOHN F. O'GRADY, by his
father and next friend, JOHN M. O'GRADY,
LEONARD ROBERTSON, by his father and next
friend, STRUAN ROBERTSON; PHILIP CRAIG, by
his brother and next friend, JOHN P. CRAIG;
BRENT E. DAVIS, by his father and next
friend, RUSSELL H. DAVIS, JR.; HARLEY H.
HALL, by his wife and next friend, MARY
LOUISE HALL; DONALD F. LINDLAND, by his
wife and next friend, BARBARA ANN LINDLAND;
JAMES M. ROZO, by his father and next
friend, SAMUEL ROZO; CHARLES E. SHELTON,
by his wife and next friend, DOROTHY M.
SHELTON; ROBERT L. STANDERWICK, by his
wife and next friend, CAROLYN STANDERWICK;
MICHAEL B. VARNADO, by his father, next
friend and Curator (Guardian), HOUSLEY
VARNADO; and MILTON J. VESCELIUS, by his
wife and next friend, JEANENE VESCELIUS,

Plaintiffs,

-against-

JAMES E. CARTER, JR., President of the
United States; HAROLD S. BROWN, Secretary
of Defense; JOHN C. STETSON, Secretary of
the Air Force; CLIFFORD L. ALEXANDER,
Secretary of the Army; and W. GRAHAM CLAYTOR,
JR., Secretary of the Navy,

Defendants.

Plaintiffs, by their attorneys, KAPLAN, KILSHEIMER & FOLEY. on behalf of themselves and all others similarly situated, for their complaint, allege:

JURISDICTION AND VENUE

1. This Court has jurisdiction based on a federal question under 28 U.S.C. § 1331. The matter in controversy arises under the Constitution, laws and treaties of the United States, including the Fifth Amendment and Chapter 10, Title 37, United States Code, and the Paris Agreement on Ending the War and Restoring Peace in Vietnam signed January 27, 1973 (the "Paris Agreement").

2. This Court also has jurisdiction under 28 U.S.C. § 1361 since the action is in the nature of mandamus to compel officers or employees of the United States to perform duties owed to the plaintiffs and the plaintiff class.

3. Venue is provided for by 28 U.S.C. § 1391(e) since each defendant is an officer or employee of the United States acting in his official capacity under color of legal authority, and one or more of the plaintiffs, resides in this District and no real property is involved in this action.

DEFINITIONS

4. In this complaint, the following definitions apply:

a. MIA--means a member of the Armed Services of the United States who, at any time during the period beginning January 1, 1961 to final judgment in this action, was carried in a "captured" or "missing" status while on duty in Indochina (whether on land or in the territorial adjacent or surrounding airspace, seas or waters) in connection with the hostilities and military operations.

b. Next-of-kin--means the spouse, children, parents, brothers, sisters, and persons officially designated as next-of-kin (in records of the defendant Secretary concerned) of MIA's, if such persons exist, and if they do not, in any particular case, then the persons who share the closest degree of blood relationship to such MIA. The legal fiduciaries of MIA's are also included in "next-of-kin" for purposes of representing the rights of MIA's.

c. Missing status--means the status of a member who is officially determined to be absent in a status of--

(1) missing;

(2) missing in action;

(3) interned in a foreign country;

(4) captured, beleaguered, or beseiged by a hostile force; or

(5) detained in a foreign country against his will. [See 37 U.S.C. § 551(2)]

d. Secretary concerned--means

(1) the defendant Secretary of the Army, or his designee, and their predecessors, with respect to matters concerning members serving in the Army;

(2) the defendant Secretary of the Navy, or his designee, and their predecessors, with respect to matters concerning members serving in the Navy and the Marine Corps; and

(3) the defendant Secretary of the Air Force, or his designee, and their predecessors, with respect to matters concerning members serving in the Air Force. [See 37 U.S.C. § 101(5)]

e. Determination of death--means any determination by the Secretary concerned pursuant to Chapter 10 of Title 37, United States Code, "Payments to Missing Persons," that a member has died. Included in this term are "official reports of death," "Presumptive findings of death," and every other such determination regardless of how denominated.

f. Continued in missing status--means any determination by the Secretary concerned pursuant to Chapter 10 of Title 37 that a member of the Armed Forces of the United States in missing status is presumed or believed to be living, or that there is no adequate basis for a determination of death.

PLAINTIFFS

5. Each of the plaintiffs is or was a member of the Armed Forces of the United States who became missing and/or captured while on active duty in Southeast Asia. Under the Missing Persons Act (37 U.S.C., § 551, et seq.), because, and for so long as, he remained in such missing or captured status, each of the plaintiffs remained presumptively alive and entitled to all pay, allowances and other benefits due members of the Armed Forces, which entitlement is automatically terminated upon a determination of death. Each of the plaintiffs has been, or is threatened with becoming the subject of such a determination of death.

(a) EARL P. HOPPER, JR., a resident of Arizona, is a Major in the United States Air Force and is represented herein by EARL P. HOPPER, SR., his father and next friend. On or about January 10, 1968, he became missing in action in North Vietnam and remains in such status to date.

(b) MICHAEL J. BOSILJEVAC, a resident of Nebraska, is a Captain in the United States Air Force and is represented herein by MARY K. BOSILJEVAC, his wife and next friend who, by Order of the District Court of Sarpy County, Nebraska, dated December 10, 1976, was designated as his Conservator-Guardian. On or about September 29, 1972, he became missing in action in North Vietnam and remains in such status to date.

(c) ROBERT A. BRETT, JR., a resident of Oregon, is a Captain in the United States Air Force and is represented herein by ROBERT A. BRETT, SR., his father and next friend who, by Order of the Circuit Court of the State of Oregon, County of Klamath, dated December 10, 1976, was designated as his Guardian-Conservator. On or about September 29, 1972, he became missing in action in North Vietnam and remains in such status to date.

(d) NICHOLAS G. BROOKS, a resident of Newburgh, New York, is a Lieutenant Commander in the United States Navy and is represented herein by GEORGE L. BROOKS, his father and next friend. On or about January 2, 1970, he became missing in action in Laos and remains in such status to date.

(e) SHELDON D. SCHULTZ, a resident of Pennsylvania, is a Chief Warrant Officer in the United States Army and is represented herein by GEORGE A. SCHULTZ, his father and next friend who, by Order of the Court of Common Pleas of Blair County, Pennsylvania, dated December 20, 1976, was designated to act as his Trustee (Guardian). On or about January 5, 1968, he became missing in action in Laos and remains in such status to date.

(f) DONALD E. SHAY, JR., a resident of Maryland, is a Captain in the United States Air Force and is represented herein by DONALD E. SHAY, SR., his father and next friend who, by Decree of the Circuit Court of Anne Arundel County, State of Maryland, dated February 9, 1971, was designated to act as his Guardian. On or about October 8, 1970, he became missing in action in Laos and remains in such status to date.

(g) JONATHAN B. BEDNAREK, a resident of the Eastern District of New York, is a Captain in the United States Air Force and is represented herein by JOHN BEDNAREK, his father and next friend. On or about May 18, 1972, he became missing in action in North Vietnam and remains in such status to date.

(h) VINCENT A. CHIARELLO, a resident of the Eastern District of New York, is a Major in the United States Air Force and is represented herein by ANNE CHIARELLO, his mother and next friend. On or about July 29, 1966, he became missing in action in Southeast Asia and remains in such status to date. It is not known exactly where this plaintiff became missing because at different times, the Department of Defense has furnished his family with various and inconsistent locations in North Vietnam and Laos.

(i) JOSEPH PETER FANNING, a resident of the Eastern District of New York, is a Captain in the United States Air Force and is represented herein by LINDA FANNING, his wife and next friend. On or about December 13, 1968, he became missing in action in Laos and remains in such status to date.

(j) PAUL O. MEDER, a resident of the Eastern District of New York, is a Colonel in the United States Air Force and is represented herein by JANE M. MEDER, his wife and next friend. On or about December 21, 1972, he became missing in action in Laos and remains in such status to date.

(k) JOHN F. O'GRADY, a resident of the Eastern District of New York, was a Major in the United States Air Force and is represented herein by JOHN M. O'GRADY, his father and next friend. On or about April 10, 1967, he became missing in action in North Vietnam and remained in such status until on or about March 15, 1977 when he became the subject of a determination of death. Such determination was made without a hearing despite the fact that a demand for such hearing was made and rejected.

(i) LEONARD ROBERTSON, a resident of the Eastern District of New York, is a Major in the Marine Corps and is represented herein by STRUAN ROBERTSON, his father and next friend. On or about July 7, 1972, he became missing in action in South Vietnam and remains in such status to date.

(j) PHILIP CRAIG, a resident of Texas, is a Lieutenant Commander in the United States Navy and is represented herein by JOHN P. CRAIG, his brother and next friend. On or about July 4, 1967, he became missing in action in North Vietnam and remains in such status to date.

(k) BRENT E. DAVIS, a resident of California, was a Major in the Marine Corps and is represented herein by RUSSELL H. DAVIS, JR., his father and next friend. On or about March 18, 1966, he became missing in action in North Vietnam and remained in such status until on or about June 15, 1976 when, without a hearing, he was the subject of a determination of death.

(l) HARLEY H. HALL, a resident of the State of Washington, is a Commander in the United States Navy and is represented herein by MARY LOUISE HALL, his wife and next friend. On or about January 27, 1973, he became missing in South Vietnam. He remained in missing status for approximately two weeks, at which time, on the basis of additional information, he was placed in captured status and he remains in such status to date.

(m) DONALD F. LINDLAND, a resident of Florida, is a Commander in the United States Navy and is represented herein by BARBARA ANN LINDLAND, his wife and next friend. On or about September 6, 1972, he became missing in action in North Vietnam and, on the basis of information received, was promptly placed in captured status and remains in such status to date.

(n) JAMES M. ROZO, a resident of Tonawanda, New York, is a Staff Sergeant in the United States Army and is represented herein by SAMUEL ROZO, his father and next friend. On or about June 23, 1970, he became missing in action in South Vietnam and remained in such status until September, 1971 when, on the basis of information received, he was changed to captured status and he remains in such status to date.

(o) CHARLES E. SHELTON, a resident of Kentucky, is a Colonel in the United States Air Force and is represented herein by DOROTHY M. SHELTON, his wife and next friend. On or about April 29, 1965, he became missing in action in Laos and remained in such status until on or about May 24, 1965 when, on the basis of information received, he was placed in captured status and he remains in such status to date.

(p) ROBERT L. STANDERWICK, a resident of Kansas, is a Colonel in the United States Air Force and is represented herein by CAROLYN STANDERWICK, his wife and next friend. On or about February 3, 1971, he became missing in action in Laos and remains in such status to date.

(q) MICHAEL B. VARNADO, a resident of Louisiana, is a Chief Warrant Officer in the United States Army and is represented herein by HOUSLEY VARNADO, his father and next friend who, by Order of the Seventh Judicial District Court of the Parish of Concordia, State of Louisiana, dated September 3, 1976, was designated to act as his Curator (Guardian). On or about May 2, 1970, he became missing in action in Cambodia and remained in such status until on or about March 8, 1973 when he became the subject of a determination of death, without a hearing.

(r) MILTON J. VESCELIUS, a resident of Michigan, is a Commander in the United States Navy and is represented herein by JEANENE VESCELIUS, his wife and next friend. On or about September 21, 1967, he became missing in action in North Vietnam and promptly thereafter, was placed in captured status and remains in such status to date.

6. Defendants:

(a) Defendant JAMES E. CARTER, JR. is President of the United States, Commander in Chief of the Armed Forces of the United States, the official superior of all of the other defendants, and he is sued in his official capacity as an officer of the United States.

(b) Defendant HAROLD S. BROWN is Secretary of Defense and the official superior of all of the other defendants except defendant President CARTER, and he is sued in his official capacity as an officer of the United States.

(c) Defendant JOHN C. STETSON is the Secretary of the Air Force and is sued in his official capacity as an officer of the United States.

(d) Defendant CLIFFORD L. ALEXANDER is the Secretary of the Army and is sued in his official capacity as an officer of the United States.

(e) Defendant W. GRAHAM CLAYTOR, JR. is the Secretary of the Navy and is sued in his official capacity as an officer of the United States.

CLASS ACTION ALLEGATIONS

7. Plaintiffs request this Court to enter an order permitting this action to be maintained as a class action pursuant to Rule 23, F. R. Civ. P., based on appropriate findings under parts (1) and (2) of the subdivision (b) of Rule 23.

8. Description of class. The class which plaintiffs seek to represent is composed of all MIA's. This class consists of two (2) sub-classes. Sub-class A is composed of those MIA's who are still in missing status. Sub-class B is composed of those MIA's who, having been in missing status, became the subjects of determinations of death.

9. The prerequisites to a class action set forth in subdivision (a) of Rule 23 are met as follows:

a. The class which plaintiffs seek to represent is so numerous that joinder of all members is impracticable. There are more than 2,500 members in the proposed class of which approximately 750 are members of Sub-class A and the remainder are members of Sub-class B.

b. There are questions of law and/or fact common to the class which plaintiffs seek to represent, including:

(1) Whether the statutory provisions for determinations of death, 37 U.S.C. §§ 555 and 556, are unconstitutional on their face as a denial of due process under the Fifth Amendment to the United States Constitution;

(2) Whether the statutory provisions for determinations of death, 37 U.S.C. §§ 555 and 556, are unconstitutional in their application as a denial of due process under the Fifth Amendment to the United States Constitution;

(3) Whether determinations of death made by the Secretary concerned, are arbitrary and capricious and, hence, void;

(4) Whether determinations of death made by the Secretary concerned, unlawfully deprive plaintiffs and the plaintiff class of rights and benefits which inure to them by reason of international agreements to which the United States is a party, specifically, the Paris Agreement.

This listing does not exhaust the questions of law or fact which are common to the class. There are no decisive issues of law or of fact which are not common to all plaintiffs and all members of the class.

c. The claims of plaintiffs are typical of the claims of the class which they seek to represent. Plaintiffs do not have any special relationship with defendants.

d. Plaintiffs will fairly and adequately protect the interests of the plaintiff class. Plaintiffs' claims are typical and representative of the claims of the class. There do not now appear to be any defenses of a unique variety which may be asserted against plaintiffs. Plaintiffs do not have any interest which is antagonistic to the plaintiff class. Plaintiffs' attorneys are experienced in the class action litigation and in litigation respecting the issues in this action.

10. The prerequisites to a class action set forth in subdivision (b) of Rule 23 are met as follows:

a. prosecution of separate actions by individual members of a class with so many members would create the risk of inconsistent or varying adjudications which could establish incompatible standards of conduct for the defendants to follow;

b. prosecution of separate actions by individual members of the class would create the risk of adjudications with respect to individual members of the class which could, as a practical matter, be dispositive of interests of other members of the class who were not parties to such adjudications, or could substantially impair or impede their ability to protect those interests;

c. the defendants have acted and/or refused to act, and threaten to continue doing so, on grounds generally applicable to the class, thereby making appropriate final injunctive relief and/or corresponding declaratory relief with respect to the class as a whole.

ALLEGATIONS COMMON TO ALL COUNTS

11. The defendant Service Secretaries, STETSON, ALEXANDER and CLAYTOR, are, under the Missing Persons Act (37 U.S.C. 551 et. seq.), personally or by their designees, the individuals empowered to make determinations of death with respect to MIA's in their respective branches of the Armed Forces.

12. The said Service Secretary defendants are limited and controlled in the exercise of their powers under the said Act, by the defendants President CARTER and Secretary BROWN who, as their superiors, can and have assumed control of the adjudication and disposition, by United States authorities, of MIA cases, and who control all data and information in U.S. possession or control, other than that in the actual possession of the respective branches of the Armed Services, which is relevant and necessary to the lawful and orderly adjudication of such matters. As a consequence, the wrongs complained of herein have been and are being done by means of the cooperative and coordinated performances of each of the defendants in this action. A purpose and goal of these activities is the elimination of MIA problems through determinations of death without the effort, inconvenience, difficulty and the disclosure of

information which might be required if the legal and constitutional rights of the subject MIA's were not dishonored and ignored.

13. In the pursuit of such determinations of death, next-of-kin of MIA's, and particularly the wives of MIA's, who have relied upon the undertaking of the Secretaries concerned to furnish assistance and advice, have been routinely misinformed and deceived into believing that determinations of death under the federal Missing Persons Act were adequate and necessary to authorize remarriage and the resumption of a "normal life". While such misinformation was being disseminated, it was known and widely recognized, particularly within the Department of Defense, but was not disclosed or explained by the defendants to POW/MIA families, that: the federal Missing Persons Act expressly limits its application to matters involving federal law; that the said Act does not even purport to govern matters which are subject to State law; that the right to remarry is governed by State law; and that the remarriages of MIA wives, solely on the basis of a federal determination of death, were, at the very least, subject to challenge as to their legal validity. As a consequence, such remarriages exist under the continuing threat of such challenge and a number of them have already been legally annulled. Among the MIA wives who were victims in this regard and whose remarriages, after a determination of death, were annulled, is the wife of MICHAEL B. VORNADO, a plaintiff herein. Although each of the defendants herein knew or should have known of the problems described in this paragraph, they persisted in the pursuit of illegal

and unconstitutional determinations of death without any attempt to remedy the legal and constitutional defects involved or the damage being unnecessarily inflicted upon the victims.

14. In their pursuit of invalid determinations of death, the defendants repetitively cited, as justification, "support" known to be defective--in particular, a report of the House Select Committee on Missing Persons (the "Montgomery Report"). The defendant President CARTER was expressly informed, personally and in detail, and the other defendants are believed to have known that the said Montgomery Report was, inter alia:

a. unlawful, in that:

(1) it did not have the approval of a majority of the Committee members as required by the Committee's own Rules;

(2) it was not voted upon at any meeting of the Committee with a quorum present as required by the Committee's own Rules;

(3) it covered substantive areas beyond the Committee's mandate and, hence, was ultra vires;

b. fraudulent, in that:

(1) it was filed by the Committee Chairman in the Office of the Speaker of the House under circumstances designed to hide and conceal the details of its illegality listed above;

(2) it omitted the known dissent of one Committee member so as to conceal the fact that it did not have the required approval of a majority of the Committee membership;

(3) it infers that it was the product of a real and exhaustive investigation as called for in the Committee's mandate, whereas, in fact: (a) there was little or no independent investigation by or on behalf of the Committee; (b) approximately one-half of the Committee's meager budget was returned unspent; and (c) it relied almost totally on spoon-feedings from personnel of the Departments of Defense and State who were committed to the protection of the record and performance of their respective Departments rather than the accomplishment of the Committee's mandate;

(4) it sought to justify its conclusions on "files" which the Committee knew, and had been specifically informed, were incomplete and unreliable;

(5) it infers that the Report itself was created and written by the Committee or its staff whereas much and, it is believed, most of it was prepared at and by the Department of Defense;

(6) it deals with substantive matters which the Committee and its staff had expressly told MIA family representatives were not to be considered and as to

which the Committee staff engineered the record by expressly instructing MIA family representatives not to submit evidence;

(7) it focused on unsupported speculation as to how many MIA's remain alive so as to divert attention from the MIA accounting enquiry which the Committee was mandated to but failed to adequately pursue;

(8) it was the product of selective "evidence" chosen to support a pre-designed result;

(9) it failed to deal with much known evidence;

(10) it repetitively belabors unsupported negative speculation while belittling or ignoring available positive materials which could encourage or assist in the accomplishment of an MIA accounting;

c. a product of the misuse and diversion of the appropriated funds of the Committee, in that:

(1) while the Committee knew and acknowledged that its mandate did not include any consideration of procedures involving determinations of death, the report reveals that time and resources of the Committee were expended on a totally inadequate consideration of that subject;

(2) while the Committee's mandate directed an exhaustive investigation, the report reveals that time and resources of the Committee were expended on unsupported and irrelevant speculation and opinions rather than on investigation;

(3) while the Committee's mandate directed it to exhaustively investigate and then report on specific matters, the time and resources of the Committee were expended upon drawing unsupported conclusions for which an engineered record was then sought to be created.

15. In their persistent reliance on "support" such as the Montgomery Report, whose defects were or should have been known to them, the defendants compromised and diminished their efforts to obtain a MIA accounting on the assumption that, with sufficient repetition, lies, half-truths and misrepresentations will be accepted as truthful and adequate and will justify the ignoring, by the defendants, of known and available information showing that a genuine accounting in fact is attainable in the cases of most of the MIA's not yet accounted for.

16. Thus, on information and belief, in or about March 1977, a briefing was given, in Hawaii, by the Department of Defense to a Presidential Commission headed by

Leonard Woodcock in the course of which the accounting liklihood of some 2,547 MIA's was discussed. In that briefing it was revealed that, on the basis of information now in U.S. possession, the Department of Defense has reason to know that a full and rapid accounting could be made by the Vietnamese for at least 1339 MIA's and has reason to believe that a similar accounting could be rendered in many other cases. While information such as this was known and available to them, the defendants and their representatives falsely represented to the POW/MIA families and the public that a genuine accounting was not attainable as to any but a very few of the MIA's. Furthermore, despite the fact that information such as this was known and available, many of the said MIA's became the subjects of unlawful and unconstitutional determinations of death and the remainder are now under threat of such determinations.

17. This pattern of misconduct was and is designed to side-step and avoid the defendants' obligation to pursue the obtaining of an accounting for MIA's. The process reaches its culmination in unlawful and unconstitutional determinations of death whereby, for all practical purposes, the files are closed and, apart from periodic ineffectual pieties and blandishments, the subject is effectively dropped. For each of the separate defects itemized, infra, in Counts I, II, III and IV of this Complaint, standing alone those determinations of death, their statutory basis and their method of implementation, are unconstitutional and unlawful.

COUNT I

UNCONSTITUTIONALITY OF THE STATUTE

18. Sections 555 and 556 of Title 37, United States Code, are, on their face, unconstitutional delegations of administrative power to make determinations of death.

19. Each of the following defects, standing alone, renders the statutory provisions, Sections 555 and 556, unconstitutional on their face:

a. the statutory provisions do not provide for or require the giving of a notice of the pendency of a proceeding which could result in a determination of death, to the subject MIA, or to any representative of the said MIA who is free of conflicting interests, and the said sections also fail to provide for, require, or afford such MIA, either directly or by a representative free of conflicting interests, an opportunity to participate meaningfully in such a proceeding and thereby denies him a full and fair hearing;

b. there are no statutory criteria, nor even a statutory policy, to guide or govern the Secretary concerned in his decision as to whether or not to convene a status review and/or in his decision as to whether or not to make a determination of death under the challenged legislation;

c. the statutory provisions permit the Secretary concerned to make determinations of death in the total absence of any evidence or information of the fact of death;

d. there is no statutory rulemaking authority delegated to the Secretary concerned with respect to determinations of death and, therefore, the Secretary concerned may and does proceed only on a case-by-case basis, thus merging the rulemaking and adjudicative functions of an administrative agency.

20. The effect of each of the four constitutional defects described in paragraph 19 is to deprive the MIA's who are the subjects of status reviews and determinations of death under the Missing Persons Act, of their due process rights under the Fifth Amendment to the United States Constitution.

COUNT II

UNCONSTITUTIONAL APPLICATION OF STATUTE

21. Sections 555 and 556 from Title 37, United States Code are applied in a manner which constitutes an unconstitutional delegation of administrative power to the defendants in their official capacities to make conclusive determinations of death.

22. Each of the following defects, standing alone, renders the statutory provisions of Section 555 and 556 unconstitutional as applied:

a. there is no procedure or requirement for the giving of notice to the subject MIA, either directly or to a representative of his who is free of conflicting interests, of the pendency of a status review and, in fact, such notice is withheld and such MIA and his representatives and their counsel are excluded from participation in any review before the adjudicators of the fact of death;

b. those who adjudicate the fact of death are never exposed directly to anyone who opposes the determination of death--at best, in lieu of a genuine hearing, some persons, in some cases, are granted a "non-adversary" interview, under totally inadequate circumstances and conditions, with one to three "hearing officers" who, in fact, are responsible for prosecuting and obtaining the determination of death and who then indicate that they will convey the views expressed to the adjudicators of the fact of death;

c. no criteria, standards or policies have been issued to guide or govern the Secretary concerned in his decision as to whether or not to convene a status review or whether or not to make a determination of death and the Secretary concerned proceeds only on a case-by-case basis;

d. the Secretary concerned, as a matter of course, makes determinations of death in the total absence of any evidence or information of the fact of death;

e. the Secretary concerned, routinely fails to convene conduct or participate in any hearing whatsoever prior to the making of determinations of death whenever so requested by a next-of-kin who is a recipient of governmental benefits, regardless of whether or not such next-of-kin has interests which are antagonistic to or inconsistant with the interests of the subject MIA;

f. status reviews which can, and regularly do, lead to determinations of death are authorized to proceed and such determinations of death are authorized to be made while the search and accounting effort for the subject MIA is still being actively pursued and before it has been completed or all known sources of information have been fully examined and the results made known;

g. there is no requirement nor is any adequate effort made to marshal, organize and present to the adjudicators of the fact of death, all of the relevant evidence and data in the possession of or available to the United States Government at the time that the status review occurs and, in fact, a vast amount of such evidence and data is routinely and deliberately supressed and withheld;

h. the adjudicators of the fact of death at a status review are required to ignore and do refuse to consider any information or evidence which happens to be classified regardless of its nature and regardless of its relevance to the issue of whether death has occurred;

i. no witnesses appear at a status review to testify and submit to cross-examination but, instead, short written summaries are submitted of the government's "evidence" in favor of a determination of death, consisting, in the main, of sanitized and remote hearsay which cannot be tested for truthfulness, completeness or reliability;

j. there is no provision for or opportunity for formal factual discovery in preparation for a status review;

k. there are no rules of procedure and no rules of evidence whatsoever governing status reviews;

l. status reviews are so structured and conducted that they become punitively and prohibitively expensive for those who wish to protect MIA rights.

23. Each of the plaintiffs and each member of the class is or has been "continued in missing status". This determination involved a presumption that he remained alive or that there was no adequate basis for a determination of death. Thereafter, as a result of an unannounced change of policy, those who would oppose a determination of death, though consistently denied access to all relevant or potentially helpful evidence and information, are now required to present proof of survival. This is a complete reversal of the burden of proof and status reviews are now premised, not on the presumption of continuing life (which is an indispensible ingredient of the status of each man until changed by a determination of death after a status review), but on a presumption of death prior to such review. This reversal of the burden of proof and the exchange of the presumption of life by a presumption of death, occurred in secret without any notice or hearing opportunity to protect the adversely affected rights of the subject MIA's.

24. The effect of each of the foregoing constitutional defects stated in paragraphs 22 and 23 has been and is to deprive the MIA's subjected to such status reviews and determinations of death of their due process rights under the Fifth Amendment of the United States Constitution.

COUNT III

ARBITRARY AND CAPRICIOUS CONDUCT OF THE DEFENDANTS

25. Defendants have made, are making, and intend to make determinations of death in the total absence of

evidence or information that such death actually occurred. Rather, such determinations are being made on the basis of a purported lack of information about the particular MIA.

26. Defendants, in making such determinations, act in an arbitrary and capricious manner in that they fail to diligently search for or ascertain all available evidence and information about the MIA who is the subject of the particular determination. They also fail to inquire of their subordinates or elsewhere in the Executive Branch whether additional evidence and information relating to MIA's is available or can be made available. In fact, vast amounts of such evidence and information is available, but is not and has not been produced for use by or before the adjudators of the fact of death in proceedings which could lead to determinations of death.

27. With respect to those determinations of death already made, defendants could have gotten such evidence and information if, prior to making such determinations, they had required a deligent search to be made, utilizing and exhausting all resources and facilities which were available, or could have been made available, to implement such a search.

28. With respect to further determinations of death which the defendants intend to make, defendants can obtain such evidence and information, if, prior to making such determinations, they require a diligent search to be made, utilizing and exhausting all resources and facilities which are available, or could be made available, to implement such a search.

29. The absence of evidence or information about the MIA's is a result of a conscious decision by the defendants to make determinations of death without a diligent search and without exhausting the informational resources available. Consequently, the determinations of death are based upon pure speculation and guesswork respecting the fate of MIA's.

COUNT IV

LOSS OF RIGHTS UNDER INTERNATIONAL LAW

30. On January 27, 1973, Hon. William P. Rogers, as Secretary of State of the United States, signed the Paris Agreement on behalf of the United States of America with duly authorized representatives of the Republic of Viet-Nam (South Viet-Nam), the Democratic Republic of Viet-Nam (North Viet-Nam), and the Provisional Revolutionary Government of the Republic of South Viet-Nam (the Vietcong).

31. By its terms, the Paris Agreement became effective on the date of its execution.

32. Under international law and the United States Constitution, the United States is bound by the Paris Agreement.

33. Article 8(b) of the Paris Agreement provides:

> "The parties shall help each other to get information about those military personnel and foreign civilians of the parties missing in action, to determine the location and take care of the graves of the dead so as to facilitate the exhumantion and repatriation of the remains,

> and to take any such other measures as may be required to get information about those still considered missing in action." (Emphases supplied)

34. Article 8(b) of the Paris Agreement establishes an obligation under international law upon each of the parties to the Agreement in favor of members of the United States Armed Forces who are MIA's.

35. Each of the defendants, by participating in and/or by making determinations of death is removing MIA's from missing status and thus depriving them of the very rights which Article 8(b) obtained. In particular, the said defendants are depriving the MIA's of the status that permits the United States to require the other parties to the Paris Agreement to provide essential information which is not otherwise available.

RELIEF REQUESTED

36. There is no administrative remedy available to plaintiffs and the class to prevent or correct the wrongs set forth in Counts I, II, III and IV of this Complaint. Consequently, there are no administrative remedies to exhaust.

37. There is no adequate legal remedy available to the plaintiffs and the class to prevent or correct the wrongs set forth in Counts I, II, III and IV of this Complaint and, unless the defendants are enjoined and restrained from such wrongful conduct, and the wrongs already committed are undone, the subject MIA's will suffer irreparable injury.

WHEREFORE, the plaintiffs request:

a. a declaratory judgment that Sections

555 and 556 of Title 37, United States Code, are unconstitutional and void, both on their face and in their application; that the procedures of the defendants in making determinations of death are unconstitutional and unlawful; and that the determinations of death heretofore made by defendants respecting MIA's were improper and are void;

b. a preliminary and permanent injunction enjoining and restraining defendants from making determinations of death pursuant to Sections 555 and 556 of Title 37, United States Code;

c. an award of costs, disbursements and reasonable counsel fees; and

d. such other relief as is just.

KAPLAN, KILSHEIMER & FOLEY

by______________________________
Dermot G. Foley

A Member of the Firm
Attorneys for Plaintiffs
122 East 42nd Street
New York, New York 10017
(212) 687-1980

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-------------------------------------x

EARL P. HOPPER, JR., etc., et al.,
Plaintiffs,
-against-
JAMES E. CARTER, JR., et al.,
Defendants.

-------------------------------------x

77 Civ. 1793 (JBW)

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

At Brooklyn, N. Y., in the said District on September , 1977.

Upon the annexed Affidavit of DERMOT G. FOLEY, sworn to September , 1977 and the pleadings and sufficient cause appearing therefor, it is

NOW, on the motion of Kaplan, Kilsheimer & Foley, attorneys for plaintiffs,

ORDERED that, defendants show cause before this Court, Hon. Jack B. Weinstein, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Room on September , 1977, at .M., or as soon thereafter as counsel can be heard why an Order should not be entered pursuant to Rule 65 of the Federal Rules of Civil Procedure granting a preliminary injunction restraining the defendants personally or by their designees, during the pendency of this action, from making determinations of death under §§ 555 or 556 of Title 37 of the United States Code; it is

FURTHER ORDERED that, until entry of an order dispositive of the motion for a preliminary injunction, the defendants are restrained from conducting any further proceedings or making any further determinations of death under §§ 555 or 556 of Title 37 of the United States Code, either personally or by their designees, and it is

FURTHER ORDERED that plaintiffs' attorneys shall personally serve a copy of this order, together with the supporting affidavit and the summons and complaint, upon the office of the United States Attorney for this District and mail a copy, by registered or certified mail, to each of the defendants, addressed to them at their offices on or before September , 1977, at .M.; and such service shall be deemed good and sufficient service. Answering papers to be served and filed by .M. on September , 1977.

Dated at Brooklyn, New York,
September , 1977.

U.S.D.J.

AFFIDAVIT OF DERMOT G. FOLEY, ESQ., FOR PLAINTIFFS, IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----------------------------------x

EARL P. HOPPER, JR., etc., et al.,

Plaintiffs,

-against-

JAMES E. CARTER, et al.,

Defendants.

-----------------------------------x

77 Civ. 1793 (JBW)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DERMOT G. FOLEY, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before this Court and a member of Kaplan, Kilsheimer & Foley, attorneys for the plaintiffs. This affidavit is made in support of plaintiffs' application for a temporary restraining order and motion for a preliminary injunction.

2. This is a class action initiated by and on behalf of American military personnel declared missing in action during the Viet-Nam conflict ("MIAs"). Plaintiffs seek a temporary restraining order and a preliminary injunction prohibiting the defendants from making determinations

of death pursuant to 37 U.S.C. §§ 555 and 556, during the pendency of this action.

3. The facts set forth in this Affidavit are based upon an intensive investigation which I personally conducted. For a number of years I have served as the Counsel for the National League of Families of American Prisoners and Missing in Southeast Asia (the sole national organization of POW/MIA families). I have been closely associated with the MIA situation and have kept myself thoroughly informed about it continuously since November 1967.

4. The requested relief is urgently needed at this time because the plaintiffs and the plaintiff class who are still in missing status are in imminent danger of irreparable injury due to provisions of the Paris Agreement on Ending the War and Restoring Peace in Viet-Nam (the "Paris Agreement") of January 1973 and the effect which the said agreement has on the rights of persons who are not "still considered missing in action". The defendants at present are putting into operation a plan whereby determinations of death are to be made which violate the constitutional rights of the subject MIAs and which threaten to exclude them from the benefits and protection of the terms of the Paris Agreement. The details of this danger will be dealt with more

particularly later in this Affidavit. Proceedings leading to these determinations of death are now scheduled to commence within a matter of a week or less.

5. Plaintiffs' Complaint sets forth four (4) Counts. Each of the said Counts alleges grounds for plaintiffs' contention that determinations of death by the defendants are improper, unconstitutional and/or unlawful.

BACKGROUND - THE McDONALD CASE AND ITS CONSEQUENCES.

6. On May 4, 1973, I made a written request upon a representative of the United States Air Force seeking information on the procedures which lead to determinations of death. The response, dated May 9, 1973, informed me that the Air Force position was:

> "There are no published service regulations, rules evidentiary standards, or procedures prescribed in implementation of the law. Next of kin are not routinely advised of an impending status determination . . . . The status determination decision making process is not, however, an adversary proceeding bound by formal rules of evidence or procedures. Nor does the law contemplate or provide for personal hearings or appearances before the Secretarial delegatee by next of kin either in person or by counsel.

> "There is no appeal to the Secretarial determination which is conclusive even as to whether information received is to be construed and acted on as an official report of death."

7. To my knowledge, the other branches of the Armed Forces adhered to essentially the same position as did the Air Force.

8. By the end of May 1973, a decision had been made by MIA families to file an action challenging the constitutionality of §§ 555 and 556 of Title 37 U.S.C. I filed McDonald v. McLucas in the United States District Court for the Southern District of New York in July 1973.

9. The constitutional challenges in the McDonald case were similar to some of those raised in the present action. However, in McDonald the plaintiffs were the next of kin of MIAs, rather than the MIAs themselves, and protection was sought not only for the personal interests of the MIAs (as here) but also for the personal interests of the next of kin as designated beneficiaries who received allotments from the pay and allowances of the MIAs.

10. The decision of the three-judge court in the McDonald case (reported at 371 Fed.Supp. 831) held essentially: that determinations of death involved adjudications of fact affecting property interests and, therefore, all subject to due

process requirements; that next of kin recipients of governmental benefits were deprived of a protected property interest without a hearing when determinations of death are made; and, that, consequently, provisions of the challenged legislation under which such determinations are made are unconstitutional both on their face and as applied. Thus, McDonald did not address the personal rights of the MIAs themselves.

11. It is significant that, in lieu of discovery, a stipulation of facts was submitted in the McDonald case. A copy of the said stipulation is attached hereto as Exhibit "A". While Exhibit "A" consists mostly of contested allegations, the parties agreed:

a. that there are no criteria, standards or policies (paragraph 1, page 1);

b. that no notice or hearing opportunity is given to persons interested in determinations of death (paragraph 2, pages 1 & 2);

c. that interested persons are not permitted to attend or participate formally in reviews which may lead to determinations of death (paragraph 2, page 2).

12. After the McDonald decision, the regulations

of the three Services were revised to provide some hearing rights to recipients of governmental benefits. This was done on the basis of the McDonald decision to permit such persons to protect their personal interests. Obviously it had nothing to do with the protection of the personal interests of the subject MIAs. Copies of the said regulations are attached as Exhibit "B". The Complaint herein alleges that, under these regulations, the Missing Persons Act is applied in an unconstitutional manner to accomplish determinations of death. These defects, which are itemized, infra, are the focus of challenge under Count II of the Complaint.

13. Following the announcement by the Department of Defense on August 16, 1977 of a resumption of determinations of death, a letter dated August 25, 1977 was sent to the next of kin of Air Force MIAs. This letter, a copy of which is attached as Exhibit "C", was intended to amplify the provisions of the relevant regulations. Rather than protect due process rights, the provisions of this letter, it is submitted, further restrict and hamper the exercise of such rights. The Air Force practices explained in Exhibit "C" are being substantially duplicated by the Navy and Army.

THE McDONALD PRELIMINARY INJUNCTION.

14. Early in the McDonald litigation, the plaintiffs sought a preliminary injunction restraining determinations of death during the pendency of the action. The injunction motion was decided in an opinion reported at 371 Fed.Supp. 837 and was granted with one important and troublesome exception.

15. That exception permitted determinations of death to be made upon the written request of a so-called "primary next-of-kin" in cases based on actual information in the possession of the Service Secretary involved.

16. It is plaintiffs' position that such an exception should not be attached to any injunction granted in the present litigation. Any person who would exercise such a right to permit the violation of due process rights of a MIA would, we submit, be necessarily antagonistic to the MIA's interests. Whatever would motivate such an act, the actor is in unequivocal conflict with the MIA's interests.

17. Apart from this exception, however, the circumstances which led the court to grant the preliminary injunction in the McDonald case are strongly present in the action now before this court.

UNCONSTITUTIONALITY OF STATUTE.

18. Defendants claim that they are authorized to make determinations of death pursuant to §§ 555 and 556 of Title 37 of the United States Code. The said sections are unconstitutional on their face for each of four (4) separate reasons:

a. There are no statutory criteria or standards anywhere in the legislative scheme to guide or govern the Secretary concerned as to when or whether to make a determination of death and thus there is an unconstitutional delegation of legislative authority to the Secretary concerned;

b. There is no statutory rule making authority delegated to the Secretary concerned with respect to determinations of death and therefore the Secretary concerned may only proceed on a case-by-case basis, merging his rule making and adjudicative functions;

c. The statutory provisions do not provide for or require the giving of notice of a status review nor do they provide or require an opportunity for adversely affected MIAs to participate in a fair hearing before such determinations are made; and

d. The statutory provisions expressly authorize the Secretary concerned to make a determination of death in the total absence of any evidence or information to support such determination.

19. There is no purpose to be gained in extensive argument as to whether or not these claims of the plaintiffs are true. They are really not open to argument since the statutory material speaks for itself and each of the said defects is plain on the face of the statute. The first three (3) of the said four (4) defects refer to details which are absent from the statutory provisions. The fourth objection arises from provisions included in the sections. Specifically, the challenged legislation permits a determination of death "when warranted by information received or other circumstances" (emphasis supplied). Obviously, such "other circumstances" can only mean circumstances other than "information received" and thus constitute guesswork and speculation. Likewise, the challenged legislation authorizes a determination of death by the Secretary concerned when he considers "that the information received, or a lapse of time without information, establishes a reasonable assumption that a member in missing status is dead" (emphasis supplied). Again, uninformed determinations are authorized and

there is not even an indication of how much time must elapse or what other criteria must be considered before a determination of death is made.

20. We submit that each of the four (4) constitutional defects listed above, separately, renders §§ 555 and 556 unconstitutional and void. Hence, they do not furnish a legitimate authorization for determinations of death. There is no ground for any factual argument about these defects in the challenged legislation.

UNCONSTITUTIONAL APPLICATION OF STATUTE.

21. In implementing the provisions of §§ 555 and 556 the defendants employ procedures which themselves are unconstitutional in the following respects:

a. There is no procedure or requirement for the giving of notice to the subject MIA, either directly or to a representative of his who is free of conflicting interests, of the pendency of a status review and, in fact, such notice is withheld and such MIA and his representatives and their counsel are excluded from participation in any hearing before the adjudicators of the fact of death;

b. Those who adjudicate the fact of death are never exposed directly to anyone who opposes the determination of death -- at best, in lieu of a genuine hearing, some persons, in some cases, are granted a "non-adversary" interview, under totally inadequate circumstances and conditions, with one to three "hearing officers" who, in fact, are responsible for prosecuting and obtaining the determination of death and who then indicate that they will convey the views expressed to the adjudicators of the fact of death;

c. No criteria, standards or policies have been issued to guide or govern the Secretary concerned in his decision as to whether or not to convene a status review or whether or not to make a determination of death and the Secretary concerned proceeds only on a case-by-case basis;

d. The Secretary concerned, as a matter of course, makes determinations of death in the total absence of any evidence or information of the fact of death;

e. The Secretary concerned, routinely fails to convene, conduct or participate in any hearing whatsoever prior to the making of determinations of death whenever so requested by a next of kin who is a recipient of governmental benefits, regardless of whether or not such next of kin has interests which are antagonistic to or inconsistent with the interests of the subject MIA;

f. Status reviews which can, and regularly do, lead to determinations of death are authorized to proceed and such determinations of death are authorized to be made while the search and accounting effort for the subject MIA is still being actively pursued and before it has been completed or all known sources of information have been fully examined and the results made known;

g. There is no requirement nor is any adequate effort made to marshal, organize and present to the adjudicators of the fact of death, all of the relevant evidence and data in the possession of or available to the United States Government at the time that the status review occurs and, in fact, a vast amount of such evidence and data is routinely and deliberately suppressed and withheld;

h. The adjudicators of the fact of death at a status review are required to ignore and do refuse to consider any information or evidence which happens to be classified regardless of its nature and regardless of its relevance to the issue of whether death has occurred;

i. No witnesses appear at a status review to testify and submit to cross-examination but, instead, short written summaries are submitted of the government's "evidence" in favor of a determination of death, consisting, in the main, of sanitized and remote hearsay which cannot be tested for truthfulness, completeness or reliability;

j. There is no provision for or opportunity for formal factual discovery in preparation for a status review;

k. There are no rules of procedure and no rules of evidence whatsoever governing status reviews;

l. Status reviews are so structured and conducted that they become punitively and prohibitively expensive for those who wish to protect MIA rights.

22. In addition, in paragraph 23 of the Complaint, it is alleged that by means of a less than subtle reversal of the burden of proof and of the basic presumption of continued life which is an essential ingredient of the status of each MIA before a determination of death is made, the defendants have materially violated the due process rights of

the plaintiffs and of the plaintiff class. These defects go to the heart of the proceedings leading to determinations of death and render them inescapably unfair and unjust.

ARBITRARY AND CAPRICIOUS DETERMINATIONS.

23. As indicated above, the defendants frequently make determinations of death without any evidentiary support. Such determinations are, needless to say, arbitrary and capricious.

24. Furthermore, however, the absence of evidence is not excusable. The defendants make no effort, beyond examination of some of the files in their own offices, which are incomplete and inadequate, to diligently search for and ascertain all available information. Furthermore, they fail to ascertain, prior to making such determination whether additional information is available or can be made available. Even more telling, the determination of death is accompanied by a mere summary statement of the "facts" on which it is based -- making it impossible to distinguish between determinations based on evidence and those based on conjecture. Opponents, in fact, have no real access to data.

25. By failing to require the utilization and

exhaustion of all resources and facilities available or which could be made available to aid in the search for information before making a determination based on the assumption that such information does not exist, the defendants ignore a vast amount of data which is available and they arbitrarily and capriciously avoid securing a sound informational and evidentiary basis for the determinations which they do make. Consequently, determinations of death which have been made by the defendants and the determinations of death which they are now planning to make without a diligent search and without exhausting available informational resources, are based on pure speculation and guesswork respecting the fate of the subject MIAs.

LOSS OF INTERNATIONAL LAW RIGHTS.

26. Article 8(b) of the Paris Agreement provides:

> "The parties shall help each other to get information about those military personnel and foreign civilians of the parties missing in action, to determine the location and take care of the graves of the dead so as to facilitate the exhumation and repatriation of the remains, and to take any such other measures as may be required to get information about those still considered missing in action." (emphasis supplied)

27. Thus, it will be noted that under the Paris Agreement there is no requirement for the furnishing of information concerning MIAs unless they are "still considered missing in action". Unquestionably, a determination of death by the defendants in their official capacity constitutes a unilateral declaration that the subject MIA is not "still considered missing in action" and vitiates the obligation of other parties to the Paris Agreement to furnish information about that MIA. Consequently, the unlawful and improper determinations of death of which the plaintiffs complain herein remove MIAs from missing status and deprive the plaintiffs and the plaintiff class of the very rights and benefits which they obtained under Article 8(b) of the Paris Agreement. In particular, the defendants are depriving the MIAs of the status that permits the United States to require the other parties to the Paris Agreement to provide essential information which is not otherwise available.

28. The traditional response of bureaucrats to this problem is to assure everyone who will listen that the determination of the United States Government to seek a MIA accounting is and shall remain everlasting. The difficulty with this is that it is quite irrelevant.

29. Relatives of MIAs lost in the Korean War tell me that they are still receiving this same put-off, but it has not helped get an accounting for them. The decisive factor is not any professed but unenforceable commitment of the United States but the recognition by the other side of a need and an obligation to cooperate.

30. Attached hereto as Exhibit "D" is a copy of an affidavit of Stephen Frank sworn to March 13, 1974, which I obtained and filed in McDonald v. McLucas. As that affidavit clearly shows, there is a real and profound danger that the other side will refuse to recognize any obligation to account for men who are not still considered missing in action. Thereafter, even if the Vietnamese elect to furnish an accounting in a few cases, the benefits which inure to the MIAs under Article 8(b) of the Paris Agreement will have been lost.

THE THREAT OF IRREPARABLE INJURY.

31. On August 16, 1977, the Department of Defense announced publicly that, under a decision made by the President, a specific plan and program has been developed by the defendants to accomplish early determina-

tions of death in the cases of all MIAs. These determinations are to be made regardless of the circumstances of the individual cases. This plan is presently being implemented. It involves determinations of death which are improper not only because of the constitutional issues raised in Counts I and II of the Complaint herein but also because they are based generally upon speculation and guesswork rather than positive evidence of the fact of, and/or the time, place and circumstances of the actual deaths of the MIAs involved. As this program proceeds the right to a further search for the men involved, under the terms of the Paris Agreement, is being compromised and destroyed by the defendants herein.

32. In due course, the possibility of an accounting for MIAs will be over and as to those men who were effectively excluded from such an accounting by reason of the defendants' wrongful conduct as complained of herein, the opportunity to ascertain whether they are dead or alive or to learn what became of them will be lost for all predictable time. Thus, the conduct of which the plaintiffs complain will irreparably injure them and

the plaintiff class and such danger is a clear, present threat.

33. On the other hand, there is no conceivable way in which the defendants herein can be harmed in the slightest degree by being restrained from proceeding wrongfully with determinations of death. Indeed, my diligent inquiries to date strongly persuade me that the only excuse which the defendants can offer for expediting improper determinations of death are matters related purely and solely to their administrative convenience. I submit that morally or legally such considerations are insignificant.

CONCLUSION

34. The only hope for a true accounting of MIAs depends upon halting baseless and unlawful determinations of death. This relief is urgently needed and if it is denied irreparable harm and injury will result. If the relief sought herein is granted, the defendants will be in no way injured. No prior application has been made in this or any court for the relief which the plain-

tiffs seek herein, other than the application in the McDonald case discussed at ¶¶14 through 17, infra. We respectfully request that the Court grant an order restraining the defendants from making determinations of death during the pendency of this action.

Dermot Foley

DERMOT G. FOLEY

Sworn to before me, this

6th day of September, 1977.

Notary Public

EXHIBIT "A" TO FOLEY AFFIDAVIT - STATEMENT OF FACTS STIPULATED TO BY THE PARTIES AND OF CONTESTED FACTS IN CASE ENTITLED McDONALD v. McLUCAS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

McDONALD, et al., :

Plaintiffs, :

73 Civ. 3190 CHM

- v - :

STATEMENT OF FACTS STIPULATED TO BY THE PARTIES AND OF CONTESTED FACTS.

McLUCAS, et al., :

Defendants. :

---------------------------------------x

SIRS:

1. Respecting the allegations in Paragraph 14a of the Complaint, Plaintiffs and Defendants stipulate that there have been no "criteria, standard or policies" issued by or for the Secretaries of the military departments. The Defendants further contend, however, that the Secretaries and their designees act reasonably in accordance with the commands contained in 37 U.S.C. Sections 555 and 556 to make such determinations as may be appropriate in light of the circumstances of each particular case. The plaintiffs dispute this contention and further state that the language used above to describe this contention is not sufficiently responsive to show the alleged rational connection that Defendants claim exists between their acts and any specific language in the statutes upon which they rely.

2. Respecting the allegations of Paragraph 14b of the Complaint, the parties agree that the services do not have any regulation requiring and, in fact, do not give either next-of-kin or other persons interested in a determination of the status of a particular missing Service member specific notice

BEST COPY AVAILABLE

in advance of the time and place of a review which may result in a change of the status of such member.

Defendants further contend, however, as follows: (a) that the Services notify next-of-kin when a member of a uniformed Service has been determined to be in a "missing status" and advise next-of-kin at that time that a review of such status will be made at the end of a year, or sooner if appropriate; (b) that the Services continuously provide each missing Service member's next-of-kin with all pertinent information concerning him, although they do not systematically indicate to such next-of-kin when "information received or other circumstances" may lead to a review of the "missing status" of a particular missing Service member.

Plaintiffs do not concede these contentions except that they agree that the Services do not systematically report to next-of-kin when "information received or other circumstances" may lead to a review of the "missing status" of the particular missing service member.

The parties agree that the Services do not permit next-of-kin or other persons interested in a determination of the status of a particular missing Service member to attend or participate formally in any review which may result in a change of the status of such member. Defendants further contend, however, that the Services welcome such information and views as such next-of-kin or other persons may provide, and that they take such information and view into consideration in making a change in the status of such member.

The plaintiffs do not agree with these contentions of defendants, and further the plaintiffs contend that next-of-kin and other interested persons are not furnished a full copy of all of the information considered in a status review, and are not afforded an opportunity to cross-examine or otherwise test such information, are not afforded an opportunity when the status of an MIA is being reviewed or a change considered by those conducting the review, to present their views with respect to the logical or other conclusions to be drawn from such information or other material considered and otherwise are not afforded an opportunity of meaningful participation in a fair hearing.

3. (a) Defendants contend that after a member of a uniformed service has been determined to be in a "missing status", a review of his status is undertaken either when new information about him is received, or when a year has passed, whichever first occurs. Plaintiffs do not concede that a status review prior to 12 months after determination of "missing status" only occurs when "new information" is received concerning the subject MIA as alleged in Paragraph 3(a).

(b) Defendants contend that the review that is undertaken consists of careful examination and evaluation of the missing Service member's file. That file contains all the information which the Service concerned has been able to obtain concerning that member, including information initially obtained upon a painstaking investigation of the circumstances under which he became missing and such information as subsequent investigation has provided. The nature of the initial investigation is described in the following regulations: AR 600-10, Chapter 8 (a copy of which has been previously provided) and AR 15-6 (a copy of which is provided herewith), AFM 30-4, Chapter 2 (a copy of which has been previously provided), NAVPERS 15791B, Article 4210100 (a copy of which has been previously provided), and MCO P3040.4A, Chapter 7 (a copy of which has been previously provided).

Plaintiffs do not concede that the evaluation referred to is "careful" or that the investigation referred to is "painstaking" as alleged in Paragraph 3(b). Further, we do not concede that there is a single file for each MIA or that all the information that could be obtained respecting the subject MIA's has been obtained or is included in files of the defendants used for status review purposes.

Plaintiffs do not concede that AR-600-10 Ch. 8, AR 15-6, AFM 30-4 Ch. 2, NAVPERS 15791B Art. 4210010 and MCO P3040.4A Ch. 7, to which reference is made in Paragraph 3(b), have binding effect upon the status review procedure authorized by 37 U.S.C. Sections 555 and 556 nor do we agree that the provisions of the said regulations are relevant to this action, or in fact, are consistently complied with in the process of making determinations of death. We further point out that the said regulations were contained in 1875 pages of material delivered to plaintiffs' attorneys by defendants' attorneys between October 2 and October 16, 1973 and that, due to the volume of said materials and the schedule for briefs, hearings and conferences with the Magistrate, during the said period, there were certain physical limitations on the ability of counsel to devote time for a more exhaustive review of these materials than has been made.

(c) Defendants contend that each of the Services has established an informal board or council of persons experienced in the casualty area to conduct such review. The persons conducting the review vary from service to service. In each service, each person participating in the review personally reviews the entire file relating to the particular missing Service member and reaches his own conclusions and recommendations, which he records in the file in writing.

In the Army, the persons who review the file consist of a casualty officer (a Lt. Colonel) in the PW/MIA branch of the Casualty Division, a casualty officer (a Major) outside the PW/MIA branch of the Casualty Division, a senior enlisted man (a Master Sergeant), and a civilian employee. After their review, the file is further reviewed by the Chief of the Casualty Division (a Colonel).

In the Air Force, the persons who review the file are those holding the positions listed in attachment 4 (a letter dated 18 November 1971) to the affidavit of General Travis R. McNeil, sworn to July 24, 1973. In practice, these persons have not been of rank lower than Colonel.

In the Navy, the persons who review the file are a Captain, two Commanders and a civilian employee.

In the Marine Corps, the persons who review the file are the Head of the Casualty Section of Headquarters, Marine Corps (a Major), the Administrative Officer of the Casualty Section (a 1st Lieutenant), the Administrative Officer for the Personal Affairs Branch (a Captain), and the Legal Advisor to the Head of the Personal Affairs Branch (a civilian attorney).

Plaintiffs do not concede that the "persons conducting the review" examine all available information respecting the subject MIA and we contend that a more limited area of information is encompassed in the "entire file" (or files) of the subject MIA. We do not question the rank or position which defendant claims for those who participate in review procedures because we do not concede that it is a matter of any relevance. However, with respect to Paragraph 3(c), we wish to affirm that we object to the receipt in evidence of the affidavit of General Travis R. McNeil, or, for that matter any evidence which is not subject to cross-examination. (General McNeil was one of the persons whose deposition we noticed and sought to take in this action).

(d) Defendants contend after the review by such persons, as described in 3(c), the Secretarial designee in each of the Services (whose identities are given in the affidavits defendants filed July 27, 1973) himself studies the file, discusses it with the other reviewing persons as he deems appropriate, and then decides whether to determine the missing Service member to be dead (and, if so, on what basis) or whether to continue him in a "missing status." Since the summer of 1973, each of the Secretaries concerned has made changes of status a matter for his personal attention before they become effective.

Plaintiffs do not concede that the "file" allegedly studied by the Service Secretary's designee constitutes all of the available information respecting the subject MIA, nor do we concede that there is any regular practice of discussion of the respective cases among the Service Secretary's designee and the other reviewing persons prior to the making of a determination.

(e) Defendants contend that in each of the Services, reviews are made after the first annual review whenever information received or other circumstances lead either the casualty officer or the Secretarial designee to the conclusion that a review is appropriate. Such reviews occur with considerable frequency in some cases and only rarely in other cases. Some events, such as the debriefing of returned prisioners of war, may lead to a review of all files of missing Service members then pending. The fact that a particular case is reviewed, or that all cases are reviewed, however, does not mean that any determination of death will result. The decision whether any particular missing Service member is to be determined to be dead continues to be made on a case-by-case basis.

Without conceding that the range of activities performed by the defendants and their subordinates are appropriate, legal or constitutional, plaintiffs do not concede the appropriateness of any conclusion by a casualty officer or a Secretarial designee to engage in a status review. Plaintiffs agree with defendants that defendants make their determinations pursuant to 37 U.S.C. Sections 555 and 556 on a case-by-case basis and contend that this is due to the absence of criteria or standards in the said sections or in Service regulations which guide or govern those making such determinations.

(f) Defendants contend that as a matter of practice, each of the reviewing persons in reaching his recommendation, and each of the Secretarial designees in reaching his decision, takes into account the following to the extent available and pertinent:

All information disclosed by investigation of the event by which the missing Service member involved entered "missing status";

All additional intelligence which has been obtained in the interim between the member's entry into "missing status" and the date of the review;

All information received from the other side in the Vietnam Conflict;

All information received from returning prisioners of war; and

All information obtained from examination of the crash or other site of the incident in which the member became missing.

Plaintiffs contend these areas of consideration do not constitute a substitute for a full hearing on notice to adversely affected persons, do not constitute a set of standards or criteria applicable to all cases and are not required to be considered in any case. Plaintiffs further specifically deny that all information and intelligence which has been or which could be obtained is considered or available for consideration by the reviewing persons. Finally, plaintiffs do not concede that the factors considered by the reviewing persons are "pertinent" to the exclusion of other factors.

4. Respecting Count II of the Complaint, Plaintiffs have made four basic contentions which they claim are dispositive and which have been affected more or less by the statements of agreed fact herein in the following manner:

a. Is the authority conferred upon the defendants under Sections 555 and 556 (of 37 U.S.C.) to make findings of death, implemented on a case-by-case basis without resort to any administratively issued criteria, standards or policies which guide or govern the defendants as to whether or not to make a finding of death?.

Plaintiffs position is that this has been conceded by defendants.

b. Is the authority thus conferred upon defendants implemented without any administrative requirement of notice to next-of-kin and persons adversely affected, of the pendency of a status review and in a manner which excludes them from any participation in the review proceedings?

Plaintiffs position is that this has been conceded by defendants.

c. In implementing the authority thus conferred upon them, do the defendants (or their designees) actually convene, conduct or participate in a hearing or review prior to making a finding of death?

Plaintiffs position is that defendants have discussed this in their description of the mechanics of status review procedure and plaintiffs' specific contentions respecting this description appear supra. Further, plaintiffs contend that the procedures described by defendants do not constitute a hearing or review that satisfies due process requirements.

d. In implementing the authority thus conferred upon them, do defendants make findings of death in the absence of supporting evidence or information?

Plaintiffs position is that defendants do not deny that they make determinations on the basis of circumstances other than information received and that they make determinations changing status on the sole basis of continued absence without other information. Plaintiffs contend that such determinations cannot be viewed as supported by evidence or information, as constitutionally required, without engaging in the manifestly illogical and untenable argument that non-information is information. Plaintiffs further contend, as discussed supra, that, in fact, defendants engage regularly in determinations based on non-information, speculation, and guesswork.

Plaintiffs emphasize that the above document was the product of an effort, at Court direction, to arrive at an adequate stipulation of facts with the aid of Magistrate Raby, so that, possibly, the need for the discovery which Plaintiffs had noticed prior to the entry of the Order scheduling briefs and a hearing herein might be obviated. To the extent that certain of the relevant issues have not been reduced to an agreed stipulation and remain in contest, plaintiffs have not, and do not now, waive their discovery rights and wish to respectfully include in the record a statement to that effect. As a further effort to resolve the problems thus created it has been suggested by either the Magistrate or one of the participating attorneys that the Court, in its discretion, may conclude that the stipulated facts herein are sufficient for determination of the constitutional issues raised in Counts I and II of the Complaint. The Court may further decide that determinations depending upon resolution of the disputed issues will require an evidentiary hearing to be scheduled as quickly as feasible after it has been determined, if in fact it is so determined, that the case cannot be disposed of with finality on the basis of stipulated facts. Plaintiffs wish to state that as a matter of principle they are in agreement with such a procedure, and are prepared to exert efforts to implement it if the Court decides to proceed in that manner. Plaintiffs further realize that procedures of this nature may be sufficient, under certain circumstances, to provide the access to information that they need for the trial of the contested issues.

Dated: New York, New York
October 19, 1973

Respectfully submitted,

KAPLAN, KILSHEIMER & FOLEY
Attorneys for Plaintiffs

By______________________________
DERMOT G. FOLEY
122 East 42nd Street
New York, New York 10017
Tel: 212-687-1980

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendants

By______________________________
HOWARD S. SUSSMAN
Assistant U. S. Attorney
United States Courthouse
Foley Square
New York, New York 10007
Tel: 212-264-6324

EXHIBIT "B" TO FOLEY AFFIDAVIT - REGULATIONS OF THE THREE SERVICES

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330

AF REGULATION 35-43

22 April 1974

Military Personnel

Status Determination Changes for Missing in Action (MIA) Personnel

This regulation establishes procedures for continuance of a missing in action (MIA) status or for making changes by a finding of death or issuance of a report of death. It implements chapter 10, Title 37, United State Code.

1. Law Governing Status Reviews. Chapter 10, Title 37, United States Code, specifically authorizes continuance of a missing in action status or change in such status by a finding of death (Section 555) or issuance of an official report of death (Section 556):

§555. Secretarial review

(a) When a member of a uniformed service entitled to pay and allowances under section 552 of this title has been in a missing status, and the official report of his death or of the circumstances of his absence has not been received by the Secretary concerned, he shall, before the end of a 12-month period in that status, have the case fully reviewed. After that review and the end of the 12-month period in a missing status, or after a later review which shall be made when warranted by information received or other circumstances, the Secretary concerned, or his designee, may—

(1) if the member can reasonably be presumed to be living, direct a continuance of his missing status; or

(2) make a finding of death.

(b) When a finding of death is made under subsection (a) of this section, it shall include the date death is presumed to have occurred for the purpose of—

(1) ending the crediting of pay and allowances;

(2) settlement of accounts; and

(3) payment of death gratuities.

That date is—

(A) the date after the day on which the 12-month period in a missing status ends; or

(B) if the missing status has been continued under subsection (a) of this section, the day determined by the Secretary concerned, or his designee.

(c) For the sole purpose of determining status under this section, a dependent of a member on active duty is treated as if he were a member. Any determination made by the Secretary concerned, or his designee, under this section is conclusive on all other departments and agencies of the United States. The subsection does not entitle a dependent to pay, allowances, or other compensation to which he is not otherwise entitled. Added Pub. L. 89-554, 5(h), Sept. 6, 1966, 80 Stat. 628.

§555. Secretarial determinations

(a) The Secretary concerned, or his designee, may make any determination necessary to administer this chapter and, when so made, it is conclusive as to—

(1) death or finding of death;

(2) the fact of dependency under this chapter;

(3) the fact of dependency for the purpose of paying 6 months' death gratuities authorized by law;

(4) the fact of dependency under any other law authorizing the payment of pay, allowances, or other emoluments to enlisted members of the armed forces, when the payments are contingent on dependency;

(5) any other status covered by this chapter;

(6) an essential date, including one on which evidence or information is received by the Secretary concerned; and

(7) whether information received concerning a member of a uniformed service is to be construed and acted on as an official report of death.

(b) When the Secretary concerned receives information that he considers establishes conclusively the death of a member of a uniformed service, he shall, notwithstanding any earlier action relating to death or other status of the member, act on it as an official report of death. After the end of the 12-month period in a missing status prescribed by section 555 of this title, the Secretary concerned, or his designee, shall, when he considers that the information received, or a lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead, make a finding of death.

• • • •

(d) The Secretary concerned, or his designee, may, when warranted by the circumstances, reconsider a determination made under this chapter, and change or modify it.

• • • •

(h) For the sole purpose of determining status under this section, a dependent of a member of a uniformed service on active duty is treated as if he were a member. Any determination made by the Secretary concerned, or his designee, under this section is conclusive on all other departments and agencies of the United States. This subsection does not entitle a dependent to pay, allowances, or other compensation to which he is not otherwise entitled. Added Pub. L. 89-554, 5(b), Sept 6, 1966, 80 Stat. 629.

2. Reviewing Officers. Review hearings to consider cases under Sections 555 and 556, Title 37, U.S.C., shall be made by one or more officers appointed by the Secretary or his designee as circumstances require.

3. Notification to Next of Kin. Next of Kin (NOK) of a MIA member currently receiving governmental financial benefits which could be terminated by a status review will be notified that:

OPR: DPMSC

DISTRIBUTION: X (Stocked and issued, AFMPC/DPMSC, Randolph AFB TX 78148).

EXHIBIT "B".

a. The status of the MIA member is to be reviewed on a certain date;

b. They will be afforded a reasonable opportunity to attend the review hearing with a privately retained civilian attorney if they choose;

c. They will have reasonable access to information upon which the status review will be based; and

d. They will be permitted to present any information which they consider relevant to the proceedings.

4. **Waiver Provisions.** NOK may waive their right to attend the review hearing and still submit written matters on their behalf. Failure without good cause to exercise by the time prescribed, any of the rights extended under this regulation will be construed as a waiver of such rights, in which event the review will proceed as if such rights had been expressly waived.

5. **Policy on Classified Material.** Classified material will not be disclosed or made available to NOK, nor will it be considered by the review hearing officer or the Secretary of the Air Force, or his designee, in making a status change. However, every effort will be made to declassify such material so that as much of it as possible can be made known and available to NOK and considered in the status review process.

6. **Conduct Review of Hearings.** Review hearing proceedings will be informal and closed to the public. They are not adversary proceedings. Strict rules of evidence do not apply. While NOK will be permitted to call witnesses, they are encouraged to use written statements to expedite proceedings. The only limitation as to matters which may be considered shall be one of relevancy and materiality as to whether the member should continue to be carried MIA, or whether a report of death or finding of death should be issued.

7. **Report of Review Hearings.** The officer (or officers) appointed to conduct the review hearing will objectively review the information upon which the status review will be based, including information and argument offered by NOK, and make recommendations to the Secretary of the Air Force or his designee concerning the status of Air Force members falling within the scope of chapter 10, Title 37, USC. A summarized report of the review will be submitted to NOK for comment prior to submission to the Secretary or his designee for final decision. If NOK disagrees with the accuracy of the summary, the disagreement will be resolved by comparing the summary to a mechanical (or other verbatim) recording of the hearing. The recording will prevail over the recollection of the parties to the hearing. The Secretary or his designee will notify NOK of his decision.

8. **Costs Incurred.** Costs incurred by NOK as a result of any aspect of this program are not reimbursable by the Government.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

GEORGE S. BROWN, General, USAF
Chief of Staff

JACK R. BENSON, Colonel, USAF
Director of Administration

U.S. GOVERNMENT PRINTING OFFICE : 1974—O-558-593

CHANGE
No. 2

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC, 27 May 1974

PERSONNEL—GENERAL

THE ARMY CASUALTY SYSTEM

This change adds regulatory authority to conduct reviews of missing service members by HQDA.

AR 600-[illegible] 9 March 1972, is changed as follows:

1. Material which has been added or changed is indicated by a star.
2. Add new pages 8-5 through 8-7.
3. File this change sheet in front of the publication for reference purposes.

The proponent agency of this regulation is The Adjutant General's Office. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) direct to HQDA (DAAG-PSC) Alexandria, VA 22332.

By Order of the Secretary of the Army:

CREIGHTON W. ABRAMS
General, United States Army
Chief of Staff

Official:
VERNE L. BOWERS
Major General, United States Army
The Adjutant General

DISTRIBUTION:
Active Army, ARNG, USAR: To be distributed in accordance with DA Form 12-9A requirements for AR, Personnel General—A (Qty Rqr Block No. 352).

☆Section III. STATUS REVIEW BY HQDA

8-12. Reason for status review. Pursuant to chapter 10, Title 37, United States Code, the Secretary of the Army or his designee may elect to review the case of those service members who have been carried in a missing status. This review may be accomplished for the following reasons:

a. The passage of time without any information which could relate to the likelihood of the member's return to military control;

b. The unavailability of any information from intelligence sources regarding the status of the service member;

c. The return to military control of other PW/MIA personnel and the lack of knowledge on their part of any information relating to the status of the missing member;

d. The remains of the missing personnel are recovered and positively identified; and

e. Such other circumstances as the Secretary of the Army or his designee deem to warrant a review.

8-13. Conduct of the review. The review of the status of the service member will be conducted in the following manner:

a. The NOK currently receiving governmental financial benefits which could be terminated by a status review will be notified that the status of the member will be reviewed. (In the event there are no next of kin eligible for notice of the pending review, the Secretary of the Army may afford the same rights to the PNOK (as defined in para 1-55(3)) as though the PNOK were entitled to notice.)

b. NOK entitled to notice will be afforded the opportunity to attend a hearing, with or without a privately retained lawyer, in conjunction with this review.

c. NOK entitled to notice will be afforded reasonable access to the information upon which the status review will be based. Documents classified under the criteria specified in DOD 5200.1-R and AR 380-5 will not be made available to the NOK or to the Hearing Officer. However, every effort will be made to either downgrade the information which is classified or to present it in such a manner as to warrant removal of protective markings. (This may be accomplished by removing that portion of the information which caused it to be classified, such as the location of loss of the service member, the type mission in which he was involved, the source or collection means of the intelligence data, etc., or by unclassified summary.) In the event classified information cannot be downgraded or presented as aforementioned, the classified information will not be made available to the Hearing Officer and may not be considered in the course of the review. Assistance will be provided by the Assistant Chief of Staff for Intelligence, DA, to insure that security procedures and data are not compromised.

d. NOK entitled to notice will be afforded the opportunity before and during the hearing to present information which they consider relevant to the proceedings. NOK entitled to notice will be furnished, upon their written request, a brief statement of the facts upon which the status review will be based.

e. NOK entitled to notice may elect to exercise any or all of the rights set forth above. Notification of the pending review will be made to the NOK entitled to notice via a registered return receipt requested mail. A reply to this notification indicating the desires of the NOK will be made to the notifying office (fig 8-1). The NOK notified will be afforded 21 days from the receipt of notification in which to make an election of the above rights. If no response is received, it will be presumed that the notified NOK have elected not to exercise the rights provided. NOK who are notified will be furnished pre-addressed indicia envelopes for the purpose of acknowledging the notification of review and electing or waiving applicable rights.

f. If notified NOK elect to attend a hearing, with or without a privately retained lawyer, a hearing date will be established and the NOK making the election will be informed. Upon written request by notified NOK, a delay in the review may be granted when it can be demonstrated that such a delay would be meaningful to the review or that such a delay would be essential in affording the NOK the opportunity to exercise their rights. A request for delay must be in writing and it must be made to the office conducting the notification. The Adjutant General will appoint a Hearing Officer who shall be a commissioned officer in the grade of 0-4 or above. The hearing will be closed to the public and limited in attendance to only those NOK and their attorneys who have been afforded and elected the right of attendance, and will be nonadversarial in nature. A mechanical recording of the hearing will be prepared but will be transcribed only upon request of and at the expense of the requesting party. However, a summarized record of the hearing will be prepared in every case. The hearing agenda will be set by the Hearing Officer. Neither AR 15-6 nor strict rules of evidence apply. The inquiry will be confined to matters of official record and such evidence, to include testimony of witnesses, as the attending NOK may present. The Hearing Officer will insure that attendees are given the opportunity to review the information from official records to be considered in the hearing, that NOK attending are permitted to submit relevant information, and that NOK attending are informed of the final recommendation of the Hearing Officer and the reasons therefor. If requested by the Hearing Officer, The Judge Advocate General will provide an attorney to be present for the hearing to provide legal advice to the Hearing Officer. If requested by the Hearing Officer, the Commanding Officer, USA Memorial Affairs Agency will provide a representative who is skilled in the forensic sciences and the identification processes used within that organization.

g. NOK who have attended the hearing will be furnished, upon their request, a complete copy of the summarized record of the hearing together with the recommendation and supporting reasons to be furnished to The Adjutant General.

h. If NOK who have attended the hearing or their privately retained lawyer objects to the recommendations of the Hearing Officer, their objections to the recommendations of the Hearing Officer will be incorporated in the file sent forward to The Adjutant General. These objections must be presented to the Hearing Officer within 10 calendar days following the date the attending NOK are informed of the Hearing Officer's recommendations so that a decision by The Adjutant General is not unnecessarily delayed. An extension of this time may be granted by the Hearing Officer for good cause shown.

i. The Hearing Officer will submit the summarized record of the hearing, together with his recommendations and supporting reasons and the NOK objections, if any, to The Adjutant General of the Army who will render a decision as designee of the Secretary of the Army as to the status of the missing service member.

8-14. Costs incurred by the attending NOK. Cost incurred by the attending NOK to include travel, lodging, local transportation, legal fees, transcription costs, witness expenses, and other expenses will be borne by the attending NOK and will not be reimbursed by the Government.

ELECTION OF RIGHTS

AFFORDED BY THE SECRETARY OF THE ARMY

IN CONNECTION WITH HIS REVIEW OF THE CASE OF

____
NAME SSN

Please check and initial all applicable statements

☐________ (I, We) have read and understand the rights which (I, We) have been afforded as stated in the letter with which this form is inclosed.

☐________ (I, We) further acknowledge notice of the pending review of the case of the serviceman named above, who is (my, our) ______________.

☐________ (I, We) do hereby elect to waive all of the rights afforded (me, us) in connection with the pending review of the status of (my, our) ______________.

(I, We) Desire:

☐________ a. To be furnished a brief statement of the facts upon which the status review will be based.

☐________ b. To attend the hearing.

☐________ c. To attend the hearing with a privately retained lawyer.

☐________ d. To have reasonable access to the information from official records upon which status review will be based.

☐________ e. To have the opportunity to present any information which is considered relevant to the proceeding.

SIGNATURE(S)	RELATIONSHIP TO SERVICEMAN NAMED ABOVE	DATE
______________	______________	______
______________	______________	______

Mail completed form to:

HQDA (DAAC-PSC-P)
200 Stovall Street
Alexandria, Virginia 22332

Figure 8-1

APPENDIX

DEPARTMENT OF THE NAVY,
OFFICE OF THE SECRETARY,
Washington, D.C. 20350.

Department of the Navy Regulations for Holding Hearings Whenever a Status Change is Considered Pursuant to the Payment to Missing Persons Act (37 U.S.C. §§ 551, et seq.).

1. *Background.* Pursuant to sections 555, 556, title 37, *United States Code,* the Secretary of the Navy or his designee is required, or may elect, to review the cases of those service members who have been carried in a missing status. In the case of *McDonald* v. *McLucas,* Civil No. 73 Civ. 3190 (S.D. N.Y. Feb. 14, 1974), a Federal court ordered a hearing and certain constitutional due-process safeguards as a prerequisite to any status changes. This directive implements the court decision.

2. *Status Review.* The review of the status of a service member of either the Navy or the Marine Corps will be conducted in the following manner:

(a) Each next- of-kin of each missing service member currently receiving governmental financial benefits which could be terminated by a status review will be notified whenever the status of the member will be reviewed and a status change is being actively considered.

(b) The next-of-kin entitled to notice of the status review will be notified of their right to attend a review hearing prior to the status review. Notification of the pending review, and of the right to attend a hearing prior to that review, will be made to the next-of-kin entitled to notice via certified mail, return receipt requested. The next-of-kin notified will be afforded 21 days from receipt of notification in which to respond whether they wish to elect any of the rights afforded. If, after 21 days, no response has been received, it will be presumed that the next-of-kin have elected not to exercise the rights afforded. If, however, the return receipt indicates that the next-of-kin never actually received notification, a reasonable attempt shall be made by letter or by other means to notify the next-of-kin, and the 21-day period shall begin only upon actual notification or when reasonable attempts to locate the next of kin have been terminated.

(c) Notification to the next-of-kin will indicate a scheduled date for the hearing, not earlier than 21 days after receipt of such notification, unless next-of-kin specifically agree to an earlier date. If the next-of-kin indicate this date is inconvenient, then the hearing may be rescheduled for a date within 10 days of the original scheduled date which is satisfactory to both the Navy or the Marine Corps and the next-of-kin. Upon written request by the notified next-of-kin, a reasonable delay in the hearing may be granted when it can be demonstrated that such delay would be meaningful to the status review or that such a delay would be essential in affording the next-of-kin the opportunity to exercise their rights. A request for delay must be in writing and it must be made to the office making the notification.

(d) The next-of-kin may attend the hearing with privately retained counsel if they choose.

(e) The next-of-kin entitled to notice will be afforded reasonable access to all information upon which the status review will be based. This information shall be compiled in a file which will be available for inspection by the next-of-kin, and counsel, at the appropriate Service Headquarters, Navy Department, Washington, D.C., during normal working hours on days prior to the scheduled hearing. Upon request, it may be reproduced and forwarded to next-of-kin upon payment of standard fees for this service.

(f) The next-of-kin entitled to notice will be afforded the opportunity before and during the hearing to present information which they consider relevant to the status review proceedings.

(g) The next-of-kin entitled to notice may exercise any or all of the rights afforded them. For example, the next-of-kin may waive their right to attend the review hearing alone, or by counsel, and still submit written information considered relevant to the status review proceedings prior to the scheduled hearing date.

(h) Hearings will be conducted at the offices of the appropriate Service Headquarters, Navy Department, Washington, D.C. Costs incurred by the next-of-kin are not reimbursable by the Government.

(i) Hearings shall be conducted by a single hearing officer, appointed for that purpose.

(j) Comments or objections by the next-of-kin or their counsel to the information before the hearing officer, or to the hearing proceedings, shall be noted by the hearing officer.

(k) The hearing shall be closed to the public and limited in attendance to only those next-of-kin and their attorneys who have been afforded and elected the right of attendance. The hearing will be non-adversarial in nature and need not be recorded verbatim. The hearing may be tape-recorded, however, at the request of the next-of-kin. The agenda will be set by the hearing officer. Strict rules of evidence will not apply.

(l) The hearing officer, after his collection of information from Government records and from the next-of-kin, will forward this material to the review board. He shall include his opinion as to whether the missing service member is alive or dead, and his recommendation whether or not a status change should be made.

(m) Next-of-kin entitled to notice will be furnished, a brief statement of the facts upon which a status change was based.

(n) Next-of-kin entitled to notice who elect to waive any or all of their rights in connection with a hearing, but who prior to the hearing, decide to exercise any or all of them, shall be afforded the opportunity to exercise those rights.

26 March 1974.

Approved.

J. William Middendorf II,
J. William Middendorf II,
Acting Secretary of the Navy.

EXHIBIT "C" TO FOLEY AFFIDAVIT - LETTER DATED AUGUST 25, 1977 SENT TO NEXT OF KIN OF AIR FORCE MIA's

25 AUG 1977

MRS. ANNE W. CHIARELLO
343 76TH STREET
BROOKLYN, NEW YORK 11209

DEAR MRS. CHIARELLO

This is the follow-up as promised in our 16 August newsletter in which we announced the decision to resume status reviews on those men who remain in a missing in action or prisoner of war status as a result of the Southeast Asian conflict.

The purpose of this newsletter is to explain the procedures for making status reviews. These procedures comply fully with the provisions of Sections 555 and 556, Chapter 10, Title 37, United States Code, and satisfy the requirements of the three-judge federal court order (McDonald v. McLucas, D.C.N.Y.) which requires appropriate due process of law.

Generally, the cases will be scheduled for review in the order of loss beginning with the earliest loss. A Summary of Facts and Circumstances, which will be a consolidation of all available information pertaining to the member, will be prepared for each case. This will become the primary source of information for those who will later determine whether the member is being carried in the proper status.

Next, we will write to the primary next of kin and any others who are receiving government financial benefits as a result of the member's missing or captured status. The letter, which will be mailed 21 days in advance of the date the case will be considered, will be advisory in nature. It will explain that one of the following three options is available regarding the conduct of the review:

1. Hearing Rights - The addressee may attend a hearing at Randolph Air Force Base with a civilian attorney, if desired. The time and date of the hearing will be worked out between the next of kin and the Air Force, generally by telephone. A format has been devised for the hearings; however, they are conducted informally. If the addressee chooses to attend, the hearing will be conducted by not more than three senior officers. Technical advisors will be available. The hearing is not intended as an adversary proceeding, and only relevant information having a direct bearing on the possibility of the survival of the member may be introduced at the hearing.

EXHIBIT "C".

2. Waiver of Hearing - Selection of this option indicates the addressee does not desire to travel to Randolph Air Force Base for a hearing. The case will then be reviewed by a group of Air Force officers similar to that indicated above for a hearing.

3. Waiver of Hearing With Right to Submit Information - Basically, this is the same as the preceding option except that the addressee may submit in writing a summation of any information which should be considered by the reviewin- officers in arriving at their recommendation. As with the first option, any information submitted for consideration by the reviewing officers should be confined to that which is relevant to the possibility of survival.

A copy of the Summary of Facts and Circumstances, a form on which the selection of option can be indicated, and a self-addressed envelope for use in returning the form will be attached to the letter. If the third option is selected, the information to be considered by the reviewing officers must be returned with the form. Each case will be reviewed on an individual basis.

Upon completion of the hearing (in the case of the first option) or review (in the case of either of the other two options), each participating officer will sign the recommendation. The Assistant Deputy Chief of Staff, Personnel for Military Personnel who is also the Commander, Air Force Military Personnel Center, and has been designated by the Secretary of the Air Force as the final approving authority for status changes, will review the case before sending it to the Pentagon. At the Pentagon, it will be reviewed and coordinated by the Secretary of the Air Force and members of his staff, and then returned to the final approving authority for action. If the recommendation is made and approved that an administrative determination of death is appropriate, notification is made to the next of kin.

If you are a secondary next of kin not receiving government financial benefits, you may wonder where you fit into the procedures. Should the primary next of kin request a hearing, the secondary next of kin may attend as nonparticipants. If a hearing is waived, the secondary next of kin are advised of the impending review and informed they will be provided the results of the review as soon as possible.

Costs incurred by you as a result of any aspect of this program must be borne by you as there are no government funds available for this purpose.

Let us make one point in connection with the subject of status determinations. Some next of kin feel that a change of status to killed in action terminates the responsibility of the United States Government in obtaining an accounting for the member and to recover his remains. Nothing can be further from the truth. Our government has availed itself of all possible avenues in attempting to resolve the status of all our men who have not returned. It must be noted that of the 23 Air Force members for whom the

Vietnamese have most recently accounted, 10 had been the subject of administrative determinations of death prior to receipt of the accounting. I assure you that our government will continue indefinitely its attempts to gain the best possible accounting for those who have not returned, regardless of their official status, and to recover their remains.

We hope this has given you a better understanding of the status determination process and answered any questions you may have had on the subject. In addition, if you are a primary next of kin or one who receives government financial benefits, it may help you decide which option to exercise when the time comes for that action to be taken.

Sincerely

A.W. Gratch

A. W. GRATCH, Colonel, USAF
Asst for Casualty Matters

EXHIBIT "D" TO FOLEY AFFIDAVIT - AFFIDAVIT OF STEPHEN FRANK SWORN TO MARCH 13, 1974 IN CASE ENTITLED McDONALD v. McLUCAS

AFFIDAVIT OF
STEPHEN R. FRANK

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, STEPHEN R. FRANK, being sworn, say:

1. I am Director of Operations for an organization known as "Voices in Vital America", ("VIVA"), which is "dedicated to those who preserve our freedom, shall it forever endure". This organization has been actively engaged in working for the release and identification of our Prisoners of War and Missing in Action in Southeast Asia since 1970.

2. In the middle of July, 1973, VIVA sent over to Southeast Asia a delegation to ascertain the status of this nation's Missing in Action and unidentified Prisoners of War (who at that time numbered in excess of 1,300). This investigation was undertaken on behalf of the families of these Missing in Action and unidentified Prisoners of War.

3. On or about July 23, 1973, a meeting was arranged whereby the undersigned and three collegues would meet with Colonel Nguyen Do, Chief of Delegation for the Democratic Republic of Vietnam (i.e., North Vietnam) to the Four Power Joint Military Commission and the Assistant Head of that delegation at Camp Davis, Ton Son Nhut, Air Force Base, Saigon, Republic of Vietnam. Colonel Do is the chief representative of North Vietnam responsible for any accounting relating to the 1,300+ Americans still listed as Missing in Action or unidentified Prisoners of War.

4. During said meeting on July 23, 1973, Colonel Do was asked as to certain individuals comprising the 1,300+ list. He stated, "We do not know why you are here because your government

considers all these men dead." At said meeting, he impressed upon the undersigned the fact that his government felt it was inappropriate for any Americans to discuss with the North Vietnamese anything dealing with Americans who had already been classified as dead by the United States of America.

5. In subsequent conversations with knowledgeable people in Saigon, it was reiterated many times that the position of the government of North Vietnam is that they will not discuss any of the 1,300+ Americans who are still Missing in Action and unidentified Prisoners of War who are considered to be dead by the government of the United States of America.

6. On Friday evening, October 26, 1973, I related the above conversation to Dermot Foley, Esquire.

Dated: March 13, 1974

Stephen R. Frank

STEPHEN R. FRANK

On March 13, 1974, before me, the undersigned, a Notary Public in and for said State, personally appeared STEPHEN R. FRANK, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

Sidney A. Adair

OFFICIAL SEAL
S. A. ADAIR

5401 Wilshire Blvd., Beverly Hills, CA. 90212

NOTICE OF CROSS-MOTION TO DISMISS UNDER RULE 12(b)

CH:ECB:sbm
F.#772586

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EARL P. HOPPER, JR., by his father and next friend, EARL P. HOPPER, SR.; et al., Plaintiffs, - against - JAMES E. CARTER, JR., President of the United States, et al., Defendants.	NOTICE OF CROSS-MOTION Civil Action No. 77 C 1793

S I R S :

PLEASE TAKE NOTICE, that upon all prior papers [illegible]n filed, the annexed affidavits, and the defendants' [illegible]rting memorandum of law, the undersigned will move this Court, before the Honorable Jack B. Weinstein in Courtroom 10, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on September 19, 1977 at 9:30 A.M. or as soon thereafter as counsel can be heard for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing this action.

Dated: Brooklyn, New York
September 16, 1977

Yours, etc.,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendants
225 Cadman Plaza East
Brooklyn, New York 11201

By: Elaine C Buck
ELAINE C. BUCK
Assistant U. S. Attorney

TO:

DERMOT FOLEY, ESQ.
Kaplan, Kilsheimer & Foley
Attorneys for Plaintiffs
122 East 42nd Street
New York, N. Y. 10017

DECLARATION OF WALTER SLOCOMBE, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION

IN THE UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NEW YORK

EARL P. HOPPER, JR., by his father
and next friend, EARL P. HOPPER, SR.;
et al.,
Plaintiffs,

Civil No. 77-1793

v.

JAMES E. CARTER, JR., President
of the United States, et al.,

Defendants.

DECLARATION OF

PRINCIPAL DEPUTY ASSISTANT SECRETARY

INTERNATIONAL SECURITY AFFAIRS

I, Walter Slocombe, make the following declaration:

I am the Principal Deputy Assistant Secretary to the Assistant Secretary of Defense for International Security Affairs.

In this position my official responsibilities include providing overall policy guidance, subject to the direction of the Secretary of Defense, to the armed services in this area. I am also responsible within the Department of Defense for the United States efforts to gather information on both captured and missing American service personnel, the repatriation of captured American personnel and the recovery of remains of those who died in enemy territory, and programs of assistance for the families of those captured or missing.

The information I furnish here relating to the history of PW/MIA status determinations is based upon information provided me directly since I have assumed my current position, or upon historical records and documents to which I have had access.

During the Vietnam hostilities, many men were listed in a missing status because our adversaries refused to provide information as required by the Geneva Conventions. The nature of the war and the circumstances of loss in many cases left doubt as to the actual fate of a man and gave some basis for belief that he could have survived his loss incident.

Status reviews for missing American servicemen are required and conducted under the provisions of Title 37 U.S. Code, Sections 555-556. The statutory authority on status determinations is vested with the Secretaries of the Military Departments. The law states that: "...the Secretary concerned, or his designee, shall, when he considers that the information received, or a lapse of time without information establishes a reasonable presumption that a member is a missing status is dead, make a finding of death." Under provisions of this law, two possibilities have existed for changing a man's status:

(1) In those cases in which information is received which conclusively establishes that the member is dead, then a report of death is issued.

(2) A finding of death is made when circumstances are such that the missing individual cannot reasonably be presumed to be living. Under the applicable statute, the Service Secretaries have been required to assure full review of each missing in action case no later than one year after an individual was declared missing. However, since the military services wanted to have the most complete information possible on any particular case prior to making a status change, few "findings of death" determinations based on a presumption of death were made prior to the conclusion of the Vietnam War.

The Department of Defense began making preparations for repatriation of prisoners and detailed accountings for those missing virtually on the date the first man was lost in Southeast Asia. Extensive data has been gathered and stored in automated data handling systems for ease in correlation and analysis. This data includes extensive descriptive information on the individuals concerned, such as carefully plotted locations where they were last seen, and eyewitness accounts from our own forces as well as all accessible indigenous residents who were known to possess information about prisoners or those missing in action. One computerized program that is particularly unique contains information taken from medical records concerning all individual physical characteristics which would, with the aid of advanced technology, help facilitate the prompt and accurate identification of any remains that are recovered.

After the repatriation of the nearly 600 American prisoners in April 1973, there were still 2,505 American servicemen missing or known to be dead without their remains having been recovered. Status reviews for these missing men had been held in abeyance until the returned PWs could be questioned. The returnees, however, were able to provide information on the actual fate of fewer than 100 of the servicemen who were still listed as missing or dead.

When our men formerly held in captivity were returned, the information that they provided us was carefully analyzed and added to the data which already existed. In a number of cases, this information provided conclusive proof of death of individuals previously listed as prisoners of war or missing in action, and "reports of death" were issued. However, the reports from our returned prisoners of war indicated that many others listed in MIA status did not enter the captivity environment. This fact was particularly significant because of the intricate communication and personnel accounting system they maintained while in captivity, and served to greatly increase the presumption that they were no longer alive. It should be noted that it was the policy of the Department of Defense to make available to the individual's next-of-kin all of the factual information in existence at that time relating to any particular individual classified as MIA/PW. This policy likewise covered reports classified because of sources or methods of collection in that the factual portion was extracted and placed in the appropriate casualty file. That policy continues to date.

The issue of the prisoners of war and missing in action (PW/MIA) resulting from the war in Southeast Asia was and continues to be controversial and emotional. Complex legal, political and military implications were raised during, and subsequent to, American involvement in that conflict. Many family members sought immediate status changes from missing to deceased in order to begin their lives anew to the extent possible under the circumstances. However, implementation of the law pertaining to status reviews was restrained by court order when a class action suit (McDonald vs McLucas) was filed in July 1973 by five families of missing men. A temporary restraining order halted status reviews except when primary next of kin requested that the appropriate Service Secretary not delay action based on information in his possession. As a result of the final decree rendered on March 11, 1974, the ban on reviews was lifted on condition that certain due process requirements were met, but the Department of Defense continued the moratorium on unsolicited status reviews until the United States Supreme Court affirmed the decision of the District Court.

In September 1975, the House Select Committee on Missing Persons in Southeast Asia was established to investigate all aspects of the PW/MIA issue. The Committee met in open session for the first time on September 23, 1975 and issued its final report on December 13, 1976. During the Committee's tenure, the Department of Defense agreed to continue conducting reviews for MIAs only upon receipt of a request by the primary next of kin or definitive information of a man's death. In its final report, the Select Committee concluded:

> "That, because of the nature and circumstances in which many Americans were lost in combat in Indochina, a total accounting by the Indochinese Governments is not possible and should not be expected."
>
> "That a partial accounting by the Indochinese Governments is possible, and that the Department of Defense has the capability to assess, within reasonable limits, the nature and extent of any accounting that may be forthcoming."
>
> "That the most effective way in which an accounting may be obtained is through direct governmental discussions with the Indochinese Governments."
>
> "That the results of the investigation and information gathering during its 15-month tenure have led this committee to the belief that no Americans are still being held alive as prisoners in Indochina, or elsewhere, as a result of the war in Indochina."
>
> "That current legislation, principally Title 37, U.S. Code, Sections 555-556, adequately protects the rights of the missing persons and their next of kin."

The Select Committee recommended: "That inasmuch as the Select Committee requested a moratorium on case reviews during its tenure, the military secretaries should immediately reinstitute case reviews in the manner prescribed by public law."

In January 1977, following release of the Select Committee's report, Secretary of Defense Rumsfeld elected to defer a decision to reinstitute status reviews to the new administration.

After being apprised of all aspects of the MIA issue, President Carter told representatives of the National League of Families on February 11, 1977 that he would extend the current moratorium on status reviews, and that he would appoint a Presidential Commission to attempt to effect an accounting for the missing.

The Presidential Commission on Americans missing and Unaccounted For in Southeast Asia led by Leonard Woodcock was appointed and visited Vietnam and Laos during March 16 - 20, 1977.

The Woodcock Commission was not a diplomatic mission in the usual sense, in that it was not empowered to negotiate on behalf of the U.S. Government on any matters except those pertaining to accounting for our missing and recovering the remains of the dead. As a result of the Commission's talks in Hanoi, the Vietnamese formally undertook to give the U.S. all available information as it is found and to return remains as they are recovered and exhumed. The mechanics were established for further exchanges of information and for direct government-to-government negotiations.

Since the return of the Commission we have had two formal negotiating sessions with the Vietnamese in Paris. There is progress being made as a result of these negotiations. The remains of 11 American servicemen were returned to the Commission and we will repatriate the remains of another 22 Americans on September 30, 1977. We expect continued progress on the MIA accounting and return of remains.

The House Appropriations Committee included in the Committee Report on the Department of Defense Appropriations Bill, 1978 a statement that "status reviews must commence and be concluded in a timely and orderly fashion."

An amendment to DoD's Appropriations Bill introduced on June 30, 1977 to preclude any appropriated funds from being used to effect status changes was defeated by a vote of 260 to 180.

The decision to reinstitute case-by-case reviews followed unprecedented and lengthy efforts by the Executive and Legislative Branches to account for the missing U.S. servicemen.

Reviews, except those requested by next of kin, have been halted since mid-1973 due to litigation and pending investigations of the MIA issue, but the courts have established the constitutionality of the laws governing the review process. This, coupled with the results of the investigations, has left the Service Secretaries no recourse except to recommend a resumption of general status reviews. After careful consideration of all aspects of the issue, the President concurred with the recommendation to lift the moratorium on August 12, 1977.

Status review and accounting are two distinct issues and the President remains fully committed to obtaining the fullest possible accounting for the missing men. An accounting that confirms death by direct evidence validates a declaration or presumption of death for a missing serviceman, but it is not a legal prerequisite to a status change.

I declare under penalty of perjury that the foregoing is true and correct.

Walt Slocombe

A-90

EXHIBIT TO SLOCOMBE DECLARATION - NEWS RELEASE DATED AUGUST 18, 1977

NEWS RELEASE

OFFICE OF ASSISTANT SECRETARY OF DEFENSE (PUBLIC AFFAIRS)
WASHINGTON, D.C. - 20301
PLEASE NOTE DATE

IMMEDIATE RELEASE August 18, 1977 OXford 73189 (Copies)
OXford 75331 (Info)

SERVICES TO RESUME STATUS REVIEWS ON U.S. SERVICEMEN UNACCOUNTED FOR IN SOUTHEAST ASIA

Service Secretaries will resume status reviews of the cases of U.S. servicemen still listed as prisoners of war or missing in action as a result of the Southeast Asian conflict. Status reviews are individual, case-by-case investigations prescribed by law to determine if a serviceman should be continued in a captured or missing status or reclassified as deceased. Status reviews, except those requested by the next-of-kin, had been halted since mid-1973 due to litigation and pending investigations of the problem by the U.S. Government.

The determination to reinstitute status reviews follows unprecedented efforts by the Executive and Legislative Branches to account for missing U.S. servicemen. These included a Congressional Committee investigation, a Presidential Commission and diplomatic approaches by the State Department. Although there is no credible evidence to indicate that any U.S. servicemen are alive and being held against their will in Southeast Asia, each case will be thoroughly reviewed on its own merits.

This action in no way alters the U.S. Government's intent to obtain as full an accounting as possible of our servicemen, whether missing or deceased. Status reviews and obtaining an accounting are two distinct issues. Negotiations with the Southeast Asian governments will continue with the goal of receiving as much information as possible on all unaccounted servicemen. The casualty status of an individual will not affect our attempts to account for him. In fact, much of the specific information received from Vietnam or obtained as a result of our own efforts has concerned personnel who had been classified as killed.

The Secretaries of the Military Departments are specifically charged by statute with responsibility for status changes and for insuring that each case is reviewed exhaustively before any determination is made. The law, as written, has been upheld by the courts, and a House Select

MORE

Committee determined after 15 months of hearings that it adequately protects the rights of the missing persons and their next-of-kin. The law states: ". . . the Secretary concerned, or his designee, shall, when he considers that the information received, or a lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead, make a finding of death." This law has evolved from the experiences of three wars and has been effectively and equitably administered during, and after those conflicts. After World War II and the Korean War, all MIA classifications were terminated within a year of the end of hostilities.

The Service Secretaries will conduct all aspects of casualty matters with full respect for the rights of the missing members, with compassion for the families, and in accordance with the law. The procedure for status reviews includes a board of qualified personnel who are thoroughly familiar with that Service's combat operations in Southeast Asia, which reviews the file on each serviceman to determine if a status change is warranted. Next-of-kin of missing or captured servicemen who are receiving governmental financial benefits will be afforded the right of due process. They will be notified in advance that a review of their relative's case is to be conducted; be provided an opportunity to attend the review, with counsel if they so desire, be granted reasonable access to information upon which the status review is based; and be permitted to present any information which they consider relevant to the proceeding. Under these legal requirements, status reviews necessarily will be conducted by the missing serviceman's respective Service on an individual, case-by-case basis starting with those who have been missing the longest.

END

STATEMENT OF FRANK A. SIEVERTS, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION

STATEMENT

The U.S. Government has repeatedly pressed the Indochina communist authorities for the fullest possible information, including the return of recoverable remains, on the 2550 U.S. military personnel and U.S. civilians unaccounted for as a result of the Indochina conflict. From the start of our accounting efforts we have sought information equally for those listed as missing or prisoner of war, and for those declared or presumed dead. The question of status reviews has never affected our commitment on this humanitarian subject. We have given the Indochina governments complete lists of unaccounted for U.S. personnel and have made clear that our concern extends equally to those listed as missing or captured, and to those declared or presumed dead. Reclassifications have taken place for close to half the men listed as missing at the close of the Indochina conflict (January, 1973), and this has not affected our accounting efforts, or the Indochina governments' response, in any way. About half of those for whom information and remains have been returned from Indochina since 1973 have been personnel already in the killed or presumed dead category. At the time of the Defense Department announcement on status reviews (August 17) we again officially informed the Vietnam and Laos government that a change of status from missing to dead does not affect their responsibility to provide information and remains or our determination to press for such an accounting.

Our diplomatic and information gathering efforts on this subject also are unaffected by the question of status reviews. A U.S. team will go to Hanoi September 30 to accept the return of the remains of 22 Americans on whom information was provided in technical discussions during the June 2-3 Paris meetings between U.S. and Vietnamese officials. Our efforts to obtain an accounting from Laos and Cambodia will also continue, despite the fact that no information or remains have been forthcoming from either of these countries. It should be noted that the authorities of the three Indochina countries have repeatedly and officially stated that they hold no American prisoners, and that all prisoners captured during the Indochina conflict have been released. Our continuing information gathering efforts provide no grounds for doubting the accuracy of these statements.

Frank A. Sieverts.

Frank A. Sieverts
Deputy Coordinator for
Prisoner of War and Missing
in Action Matters

Department of State
Washington, D.C.

September 16, 1977

EXHIBIT TO SIEVERTS STATEMENT - DEPARTMENT OF STATE TELEGRAM

Department of State

PAGE 01 STATE 221959 4136
ORIGIN DHA-05

INFO OCT-01 EUR-12 EA-12 IO-14 ISO-00 L-03 DODE-00
SCS-05 /052 R

DRAFTED BY D/HA/PW: FASIEVERTS
APPROVED BY D/HA/PW: FASIEVERTS
L/EA - MR. OLINS
EA/VLC - MR. BROWN
DOD/ISA - CAPT. VOHDEN
SCA/SCS - MR. GISE (INFO)
------------------116610 152353Z /65

O 152244Z SEP 77
FM SECSTATE WASHDC
TO AMEMBASSY PARIS IMMEDIATE
AMEMBASSY VIENTIANE IMMEDIATE
USMISSION GENEVA IMMEDIATE
INFO AMEMBASSY BANGKOK IMMEDIATE
AMCONSUL HONG KONG
CINCPAC IMMEDIATE
JCRC IMMEDIATE

UNCLAS STATE 221959

E.O. 11652: GDS

TAGS: PFOR, MILI, VN, LA, CB

SUBJECT: STATUS REVIEWS FOR MIA'S

REF: STATE 193004

1. REFTEL IS DECLASSIFIED PURSUANT TO 5 FAM 922.2 BY AUTHORITY OF FRANK SIEVERTS.

2. REASON FOR DECLASSIFICATION IS THAT THIS TELEGRAM MAY BE SUBMITTED TO A U.S. FEDERAL COURT IN CONNECTION WITH A HEARING ON A RESTRAINING ORDER TO PREVENT THE US MILITARY SERVICES FROM INITIATING STATUS REVIEWS LEADING TO RECLASSIFICATION OF US MILITARY PERSONNEL FROM MISSING TO PRESUMED DEAD. VANCE

UNCLASSIFIED

A-95

ORIGIN DHA-02

INFO OCT-01 EUR-12 EA-07 IO-13 ISO-00 DODE-00 SCS-03
SSO-00 USIE-00 INRE-00 NSCE-00 CIAE-00 PM-05 H-01
INR-07 L-03 NSAE-00 NSC-05 PA-01 PRS-01 SP-02
SS-15 /078 R

DRAFTED BY D/HA/PW:FASIEVERTS
APPROVED BY D/HA/PW:FASIEVERTS
EA/VLC:MR. BROWN
DOD/ISA:CAPT VOHDEN
EA:RBOAKLEY
SCA/SCS:MR. GISE

------------------043621 152111Z /75

O 152041Z AUG 77
FM SECSTATE WASHDC
TO AMEMBASSY PARIS IMMEDIATE
AMEMBASSY VIENTIANE IMMEDIATE
USMISSION GENEVA IMMEDIATE
INFO AMEMBASSY BANGKOK IMMEDIATE
AMCONSUL HONG KONG IMMEDIATE
CINCPAC IMMEDIATE
JCRC IMMEDIATE

CONFIDENTIAL STATE 193004

E.O. 11652: GDS

TAGS: PFOR, MILI, VN, LA, CB

SUBJECT: STATUS REVIEWS FOR MIA'S

1. DEFENSE DEPARTMENT IS ANNOUNCING AUGUST 16 THAT STATUS REVIEWS ARE BEING RESUMED BY THE MILITARY SERVICES FOR US MILITARY PERSONNEL STILL LISTED AS PRISONERS OF WAR OR MISSING IN ACTION IN SOUTHEAST ASIA. SUCH REVIEWS ARE REQUIRED BY US LAW AND WILL BE CONDUCTED CASE BY CASE BY SPECIALLY CONSTITUTUED PANELS AT THE DIRECTION OF THE MILITARY SERVICE SECRETARIES.

2. SINCE 1973 SUCH REVIEWS HAVE TAKEN PLACE FOR CLOSE TO 50 PERCENT OF THE PERSONNEL LISTED AS MIA AT THE TIME OF THE PARIS AGREEMENT, LEADING TO STATUS CHANGES FROM MISSING TO PRESUMED DEAD. REVIEWS SINCE AUGUST 1973 WERE INITIATED UPON RECEIPT OF REMAINS OR AT THE REQUEST OF THE PRIMARY NEXT OF KIN (WIFE OR PARENTS). UNDER THE NEW POLICY, REVIEWS WILL BE INITIATED BY THE MILITARY SERVICES, STARTING WITH THOSE MISSING THE LONGEST. SINCE THE REVIEWS ARE UNDERTAKEN ON AN INDIVIDUAL CASE BY CASE BASIS, IT MAY TAKE AS LONG AS A YEAR TO COMPLETE THEM.

3. SINCE THE START OF OUR ACCOUNTING EFFORTS WE HAVE MADE CLEAR TO THE INDOCHINA AUTHORITIES THAT OUR CONCERN EXTENDS EQUALLY TO THOSE PRESUMED DEAD AS WELL AS TO THOSE LISTED AS MISSING. ABOUT HALF OF THOSE FROM WHOM INFORMATION AND REMAINS HAVE BEEN RECOVERED FROM INDOCHINA WERE CLASSIFIED AS KIA AT THE TIME. LISTS GIVEN TO THE VIETNAM, LAO, AND CAMBODIAN COMMUNIST AUTHORITIES HAVE INCLUDED ALL OUR UNACCOUNTED FOR PERSONNEL, THOSE DECLARED DEAD AS WELL AS THE MISSING. INDIVIDUAL CASE RECORDS GIVEN TO THE VIETNAMESE AND LAO HAVE ALSO COVERED SOME PERSONNEL LISTED AS MISSING AND SOME PRESUMED DEAD, WITH NO DISTINCTION MADE BETWEEN THESE CATEGORIES. THE OVERALL TOTAL OF UNACCOUNTED FOR U.S. MILITARY PERSONNEL IN INDOCHINA IS 2500.

4. THERE ARE ALSO SOME 40 US CIVILIANS LISTED AS MISSING OR UNACCOUNTED FOR IN INDOCHINA. THE STATE DEPARTMENT EXPECTS TO UNDERTAKE REVIEW PROCEDURES, IN CONSULTATION WITH THE NEXT OF KIN, TO RESOLVE THE STATUS OF THESE PERSONS AS WELL.

5. FOR PARIS: EMBOFF SHOULD INFORM SRV EMBASSY OF ANNOUNCEMENT OF STATUS REVIEWS, AND REMIND SRV AUTHORITIES THAT STATUS CHANGES TO PRESUMED DEAD WILL NOT AFFECT OUR DETERMINATION TO OBTAIN ADDITIONAL INFORMATION AND REMAINS, OR THE SRV'S RESPONSIBILITY TO PROVIDE SUCH AN ACCOUNTING. YOU MAY DRAW ON THE FOREGOING AS APPROPRIATE TO EXPLAIN THAT STATUS REVIEWS ARE REQUIRED BY US LAW AND HAVE THE RESULT FOR DOMESTIC PURPOSES OF CLARIFYING THE LEGAL STATUS OF THE MISSING MEN.

6. FOR VIENTIANE: YOU SHOULD MAKE SIMILAR DEMARCHE TO LPDR.

7. FOR GENEVA: PLEASE CONVEY THIS INFORMATION ALSO TO ICRC AND UNHCR. VANCE

UNCLASSIFIED, PER STATE 221959

~~CONFIDENTIAL~~

A-96

EXHIBIT TO SIEVERTS STATEMENT - EXCERPTS FROM HEARINGS BEFORE THE SUBCOMMITTEE ON ASIAN AND PACIFIC AFFAIRS OF THE COMMITTEE ON INTERNATIONAL RELATIONS, HOUSE OF REPRESENTATIVES

*
State Dept
[illegible]

Stenographic Transcript Of

HEARINGS

Before The

SUBCOMMITTEE ON ASIAN AND PACIFIC AFFAIRS OF THE

COMMITTEE ON INTERNATIONAL RELATIONS

HOUSE OF REPRESENTATIVES

MIA'S: REPORT ON CURRENT STATUS

Washington, D. C.
July 27, 1977

Alderson Reporting Company, Inc.
Official Reporters
300 Seventh St., S. W. Washington, D. C.
554-2345

taken up. Our Joint Casualty Resolution Center, I think, had some 20 or 30 Vietnamese bodies that they had identified as Vietnamese. I don't know that they made full identification. We had offered to return those bodies, and I do not think that offer was ever accepted.

Mr. Wolff. Would the Chairman like to make a comment?

Mr. Montgomery. To follow up on what Mr. Gilman said, they have been identified as Vietnamese. Of course, they can't identify whether they were South or North Vietnamese, whether they were soldiers or civilians. Can I make another comment?

Mr. Wolff. Yes. We will come to you in just a few minutes.

Mr. Montgomery. I will wait. I am sorry.

Mr. Wolff. I would like to pursue this line of questioning, if I can, for a moment.

There has been rumors afoot that there is a reclassification plan of the MIA's to KIA on almost a blanket basis. What effect do you feel this would have upon your negotiations for further information on the MIA's?

Mr. Holbrooke. On the question of status reviews, Mr. Chairman, I think that should be properly addressed to the Defense Department.

Mr. Wolff. I am not asking you about the change of status; I am asking what effect would it have upon you?

Mr. Holbrooke. None.

Mr. Wolff. It will not?

Mr. Holbrooke. It has no effect on the negotiation or our continued unrelenting efforts to press for information.

Mr. Wolff. How then do we go to the Vietnamese and say we want you to give us some information on people who are missing in action when we have already declared them dead?

Mr. Holbrooke. It makes, I see, no difference to the Vietnamese. If we ask for information of a specific American serviceman who is missing in Indochina, the legal status of that person is unrelated, in my opinion, to the degree of responsiveness the Vietnamese will show to that request.

Mr. Wolff. There have been indications that the Department and virtually everyone connected with the effort who tried to find out information indicates that they have very little hope there is anyone remaining alive. If there is, and I am not saying that there is, but if there is, would that not have an effect upon the search for even that one that might remain if they had been predetermined as KIA on our side?

Mr. Holbrooke. Mr. Chairman, I do not mean to minimize the question of status to give. It is an important question with important consequences for many Americans. But I do not believe it has any effect on our bilateral dealings with the Vietnamese Government.

AFFIDAVIT OF COLONEL A. W. GRATCH, FOR DEFENDANTS. IN SUPPORT OF CROSS-MOTION

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF

NEW YORK

EARL P. HOPPER, JR., BY HIS FATHER
AND NEXT FRIEND, EARL P. HOPPER, SR.
et al

Plaintiff,

-v-

JAMES E. CARTER, JR.
PRESIDENT OF THE UNITED STATES
et al

Defendant

Civil Action C-77-1793

AFFIDAVIT

STATE OF TEXAS)

COUNTY OF BEXAR)

I, Colonel A. W. Gratch, in my present position as Assistant for Casualty Matters, Assistant Deputy Chief of Staff, Personnel for Military Personnel, Headquarters United States Air Force, Air Force Military Personnel Center, Randolph Air Force Base, Texas, having been duly sworn deposes and says as follows:

When a status review is to be conducted, all primary next of kin and all secondary next of kin receiving governmental financial benefits are notified by letter of their entitlement to attend a review hearing with counsel, access to the information upon which the status review will be based, and the opportunity to submit information for consideration by the board and the Secretary of the Air Force or his designee. When a next of kin is notified of an impending review, he or she can elect to: attend a hearing with or without legal counsel; waive hearing rights; or submit written information while waiving the right to attend a hearing. As an individual case is prepared for a proposed status review, the Missing Persons Branch (DPMCB) insures that all information has been collected on the missing member. This effort entails a detailed check with such agencies as the Joint Casualty Resolution Center and the Defense Intelligence Agency. Once this process has been completed, all the information is correlated by DPMCB from the casualty file into a Summary of Facts and Circumstances (the Summary) which is used from then on as a source document.

The Summary is a complete account of all information and factors which are relevant to the case in making a status determination, and is provided to the next of kin. The casualty file itself is available to the next of kin who desire to view it while attending the hearing, to the review board and to the final authority in making his decision.

If the next of kin elects to require a hearing, the next of kin (and lawyer if desired) and appointed Air Force hearing officers consider the available information as described above, including information presented by the next of kin. Hearings are informal and are conducted at the Air Force Military Personnel Center, Randolph AFB, Texas. If the next of kin wish, they may request that the hearing be simply a discussion with qualified Air Force Casualty officer(s) who are knowledgeable in both casualty assistance and operational flying matters. If legal counsel accompanies the next of kin to a formal hearing, a legal advisor will be available to the status review board. Again, the meeting is informal and non-adversary. In either type of hearing, the ultimate objective is to insure that the most complete and accurate record of facts and circumstances possible is compiled, and that an appropriate recommendation is forwarded to the Secretary of the Air Force (SAF) or his designee for final action.

If the next of kin waives a hearing, the review process is essentially the same. A thorough effort is made to insure that all information has been collected. A Summary of Facts and Circumstances document is drawn up correlating all known information. A folder is then put together which includes: the Summary, the supporting casualty file, the Disclosure of Decision Form indicating next of kin's desire to waive attendance at a hearing; the determination memo which recounts the criteria on which the determination is based and indicates the recommendation to be considered by the board; and the written evidence or discussion submitted by the next of kin, if any. This package is sent to the review board members. These members review the case individually and either concur or nonconcur with the proposed status recommendation - the same as would happen during a hearing. The entire case file is then forwarded to the Office of the Secretary or his designee for his concurrence or nonconcurrence which constitutes the final action.

All information considered by the review board, including that submitted by the next of kin at the hearing or in lieu of a hearing, is submitted to the Secretary or his designee. No information will be considered by a board or by the Secretary or his designee which has not been made available to the next of kin. It should be noted that those who participate in status determination proceedings and are responsible for administering the law governing the missing in action do not take this responsibility lightly. Appointments to the boards are limited to those whose judgment and experience will insure that the interests of all concerned including the member, his family, and the Government are protected. An appeal from the decision of the

Secretary or his designee may be taken to the Air Force Board for Correction of Military Records under 10 USC 1552.

Archie W. Gratch
ARCHIE W. GRATCH, Colonel, USAF
Assistant for Casualty Matters

3 Atch
1. AFR 35-43
2. Disclosure of Decision Form
3. Statistics

Subscribed and Sworn to before me this 15th day of September, 1977, at Randolph Air Force Base, Texas.

Phyllis M. Pfeil
NOTARY PUBLIC, BEXAR COUNTY, TEXAS

PHYLLIS M. PFEIL
Notary Public, Bexar County, Texas
My commission expires JAN 31, 1979

ATTACHMENT (1) TO GRATCH AFFIDAVIT - DISCLOSURE OF DECISION FORM

DISCLOSURE OF DECISION
CONCERNING RIGHTS AFFORDED BY THE SECRETARY OF THE AIR FORCE IN CONNECTION WITH HIS REVIEW OF THE CASE OF

(I, We) understand that the Air Force will upon (my, our) completion of this form proceed with a review of the case of the service member named above who is (my, our) ________________________.

(I, We) understand the rights which have been afforded to (me, us) and have indicated by checking the appropriate block the rights desired in connection with the review to be made.

(Please check one of the boxes below)

I. ☐ Hearing Rights: (I, We) desire to attend the review hearing, and understand that a civilian attorney may attend the hearing with (me, us). (I, We) desire reasonable access to the information upon which the review will be based. A summary of the information which (I, we) desire to be considered at the review hearing (is, is not) attached.

II. ☐ Waiver of Hearing: (I, We) hereby waive (my, our) right to attend the review hearing.

III. ☐ Waiver of Hearing With Right to Submit Information: (I, We) hereby waive (my, our) right to attend the review hearing but have attached information which (I, we) desire to be considered at the review hearing.

Signature(s)	Relationship to Serviceman Named Above	Date

Mail completed form to: AFMPC/DPMCB
Randolph AFB TX 78148

ATTACHMENT (2) TO GRATCH AFFIDAVIT - DEPARTMENT OF THE AIR FORCE REGULATION 35-43

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330

F REGULATION 35-43

22 April 1974

Military Personnel

Status Determination Changes for Missing in Action (MIA) Personnel

This regulation establishes procedures for continuance of a missing in action (MIA) status or for making changes by a finding of death or issuance of a report of death. It implements chapter 10, Title 37, United State Code.

1. Law Governing Status Reviews. Chapter 10, Title 37, United States Code, specifically authorizes continuance of a missing in action status or change in such status by a finding of death (Section 555) or issuance of an official report of death (Section 556):

§555. Secretarial review

(a) When a member of a uniformed service entitled to pay and allowances under section 552 of this title has been in a missing status, and the official report of his death or of the circumstances of his absence has not been received by the Secretary concerned, he shall, before the end of a 12-month period in that status, have the case fully reviewed. After that review and the end of the 12-month period in a missing status, or after a later review which shall be made when warranted by information received or other circumstances, the Secretary concerned, or his designee, may—

(1) if the member can reasonably be presumed to be living, direct a continuance of his missing status; or

(2) make a finding of death.

(b) When a finding of death is made under subsection (a) of this section, it shall include the date death is presumed to have occurred for the purpose of—

(1) ending the crediting of pay and allowances;

(2) settlement of accounts; and

(3) payment of death gratuities.

That date is—

(A) the date after the day on which the 12-month period in a missing status ends; or

(B) if the missing status has been continued under subsection (a) of this section, the day determined by the Secretary concerned, or his designee.

(c) For the sole purpose of determining status under this section, a dependent of a member on active duty is treated as if he were a member. Any determination made by the Secretary concerned, or his designee, under this section is conclusive on all other departments and agencies of the United States. The subsection does not entitle a dependent to pay, allowances, or other compensation to which he is not otherwise entitled. Added Pub. L. 89–554, 5(b), Sept. 6, 1966, 80 Stat. 628.

§556. Secretarial determinations

(a) The Secretary concerned, or his designee, may make any determination necessary to administer this chapter and, when so made, it is conclusive as to—

(1) death or finding of death;

(2) the fact of dependency under this chapter;

(3) the fact of dependency for the purpose of paying 6 months' death gratuities authorized by law;

(4) the fact of dependency under any other law authorizing the payment of pay, allowances, or other emoluments to enlisted members of the armed forces, when the payments are contingent on dependency;

(5) any other status covered by this chapter;

(6) an essential date, including one on which evidence or information is received by the Secretary concerned; and

(7) whether information received concerning a member of a uniformed service is to be construed and acted on as an official report of death.

(b) When the Secretary concerned receives information that he considers establishes conclusively the death of a member of a uniformed service, he shall, notwithstanding any earlier action relating to death or other status of the member, act on it as an official report of death. After the end of the 12-month period in a missing status prescribed by section 555 of this title, the Secretary concerned, or his designee, shall, when he considers that the information received, or a lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead, make a finding of death.

* * * *

(d) The Secretary concerned, or his designee, may, when warranted by the circumstances, reconsider a determination made under this chapter, and change or modify it.

* * * *

(h) For the sole purpose of determining status under this section, a dependent of a member of a uniformed service on active duty is treated as if he were a member. Any determination made by the Secretary concerned, or his designee, under this section is conclusive on all other departments and agencies of the United States. This subsection does not entitle a dependent to pay, allowances, or other compensation to which he is not otherwise entitled. Added Pub. L. 89–554, 5(b), Sept 6, 1966, 80 Stat. 629.

2. Reviewing Officers. Review hearings to consider cases under Sections 555 and 556, Title 37, U.S.C., shall be made by one or more officers appointed by the Secretary or his designee as circumstances require.

3. Notification to Next of Kin. Next of Kin (NOK) of a MIA member currently receiving governmental financial benefits which could be terminated by a status review will be notified that:

OPR: DPMSC

DISTRIBUTION: X (Stocked and issued, AFMPC/DPMSC, Randolph AFB TX 78148).

PLAINTIFF'S EXHIBIT
30
[illegible] 1993

Atch 2.

a. The status of the MIA member is to be reviewed on a certain date;

b. They will be afforded a reasonable opportunity to attend the review hearing with a privately retained civilian attorney if they choose;

c. They will have reasonable access to information upon which the status review will be based; and

d. They will be permitted to present any information which they consider relevant to the proceedings.

4. **Waiver Provisions.** NOK may waive their right to attend the review hearing and still submit written matters on their behalf. Failure without good cause to exercise by the time prescribed, any of the rights extended under this regulation will be construed as a waiver of such rights, in which event the review will proceed as if such rights had been expressly waived.

5. **Policy on Classified Material.** Classified material will not be disclosed or made available to NOK, nor will it be considered by the review hearing officer or the Secretary of the Air Force, or his designee, in making a status change. However, every effort will be made to declassify such material so that as much of it as possible can be made known and available to NOK and considered in the status review process.

6. **Conduct Review of Hearings.** Review hearing proceedings will be informal and closed to the public. They are not adversary proceedings. Strict rules of evidence do not apply. While NOK will be permitted to call witnesses, they are encouraged to use written statements to expedite proceedings. The only limitation as to matters which may be considered shall be one of relevancy and materiality as to whether the member should continue to be carried MIA, or whether a report of death or finding of death should be issued.

7. **Report of Review Hearings.** The officer (or officers) appointed to conduct the review hearing will objectively review the information upon which the status review will be based, including information and argument offered by NOK, and make recommendations to the Secretary of the Air Force or his designee concerning the status of Air Force members falling within the scope of chapter 10, Title 37, USC. A summarized report of the review will be submitted to NOK for comment prior to submission to the Secretary or his designee for final decision. If NOK disagrees with the accuracy of the summary, the disagreement will be resolved by comparing the summary to a mechanical (or other verbatim) recording of the hearing. The recording will prevail over the recollection of the parties to the hearing. The Secretary or his designee will notify NOK of his decision.

8. **Costs Incurred.** Costs incurred by NOK as a result of any aspect of this program are not reimbursable by the Government.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

JACK R. BENSON, Colonel, USAF
Director of Administration

GEORGE S. BROWN, General, USAF
Chief of Staff

ATTACHMENT (3) TO GRATCH AFFIDAVIT - STATISTICS

Status changes made before the 6 Apr 73 temporary restraining order: 65

Status changes made under temporary restraining order (required letter to SECAF): 82

Status changes made since the 11 Mar 74 court decision (requires notice of a hearing): 185

Total status changes since cease fire: 332

Remaining in missing status: 380

Listed as KIA, body not recovered: 591

Total unaccounted for personnel (missing plus body not recovered): 971

Of the 332 status changes since cease fire, 247 were made based on request of PNOK

13 Sep 1977

Atc/ 3

AFFIDAVIT OF MAJOR MATT J. MARSHALL, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

EARL P. HOPPER, JR., by his father and next friend, EARL P. HOPPER, SR.; et al., Plaintiffs, v. JAMES E. CARTER, JR., President of the United States, et al., Defendants.	Civil Action No. 77 C 1793

AFFIDAVIT

Comes now affiant and first being duly sworn, states upon his oath that the matters contained herein are true and correct to the best of his knowledge and belief, as follows to wit:

1. I am Major Matt J. Marshall, presently assigned to the Marine Corps Headquarters, Washington, D.C., as the Head, Casualty Section, Personal Affairs Branch, Personnel Services Division, Manpower Department.

2. The Casualty Officer is charged with administering the Marine Corps Casualty Assistance Program, which generally includes casualty reporting, notification of next-of-kin, and all facets of processing deceased Marines. Additionally, the Casualty Officer is responsible for managing affairs associated with missing Marines, to include those missing in action (MIA) and captured (POW). My specific MIA functions are:

a. Advise the Director of the Headquarters Marine Corps Plans and Policy Division and Head, Personal Affairs Branch concerning combat status determinations under the Missing Persons Act and other matters involving MIA/POW personnel and their families.

b. Originate periodic newsletters to MIA/POW families.

c. Act as the Marine Corps primary contact for MIA/POW next-of-kin (NOK).

d. Maintain liaison and coordinates with other Services and Government agencies on MIA/POW matters within the functional responsibilities assigned.

3. MIA/POW status reviews are conducted in accordance with the Missing Persons Act (37 U.S.C. § 551, et seq.). Additionally, certain rights are afforded the next-of-kin receiving Governmental financial benefits resulting from the MIA's military service. Attachment (1) is a copy of the Navy Department regulations for affording these rights. The rights include a hearing that the next-of-kin may attend, at which time he/she would have the opportunity to examine the information upon which the status review will be based and to present information he/she considers relevant to the upcoming review. Attachment (2) is the letter appointing me Hearing Officer for all cases requiring a hearing in accordance with the aforementioned regulations. Attachment (3) is the Hearing officers guide. The hearing rights (required as a result of McDonald v. McLucas, Civil No. 73 Civ 3190 (S.D. N.Y. Feb 14, 1974) are extended to each MIA/POW next-of-kin currently receiving governmental financial benefits which could be determined by a status review. It is also Department of Defense policy to grant hearing rights to NOK not receiving governmental financial benefits. This policy benefits parents of single MIA/POW's who are not receiving any of the serviceman's earnings. The hearing is conducted using the information contained in the members personnel casualty file. Included in the file are:

a. Basic administrative documents compiled prior to the member's entering a missing status, i.e., information relative to service enlistment, previous duty assignments, education, etc.

b. The initial command investigation into the circumstances surrounding the incident which resulted in the Marine's MIA/POW status.

c. Intelligence information that correlates to the missing Marine.

d. Information obtained through State Department negotiation efforts.

e. Information obtained from the Joint Casualty Resolution Center (JCRC) pertaining to the missing member.

f. Any other information received by the Department of the Navy pertaining to the missing member.

4. Large amounts of the information originally received by the Government was in classified form, but 90% of this has been declassified and is available to the primary next-of-kin for review upon their request. All significant information relating to the fate or whereabouts of the missing Marine has been passed to the primary next-of-kin. If the originally received document containing casualty information cannot be declassified due to the need to protect intelligence methods, sources, etc., it is passed to the NOK in an unclassified summarized form or the original document is declassified and provided with the protected information deleted.

5. The NOK and attorney have the right to review all information in the personnel/casualty file. They may present information they consider relevant to the upcoming review of the missing member. This information is included in the record of the hearing and is subsequently reviewed by the duly assigned status review board, composed of three Marine Corps officers. The hearing officer endeavors to answer all questions of the NOK or his/her attorney concerning the information compiled in the personnel/casualty file. He should not comment

on the weight or sufficiency of any information in the file or presented by the NOK. The hearing officer will use his discretion to determine the need for other persons to participate in the hearing. He will do so when he believes it will contribute noncumulative information to the status review board's determination. Upon completion of the hearing, the hearing officer compiles the information submitted by both the Government and the NOK, including any comments the NOK desires forwarded to the review board.

6. The hearing record and the personnel/casualty file, along with the hearing officers status recommendation, is forwarded to the Review Board. The Board is composed of three combat experienced Marine officers who individually review the case and recommend to the Secretary of the Navy, through established military administrative channels, whether the missing member's status should be continued, or changed to deceased, body not recovered. All information considered by the Review Board, including that submitted by the next-of-kin at the hearing or in lieu of a hearing, is submitted. Appellate procedures available to the NOK are in accordance with 10 U.S.C. § 1552.

7. On January 27, 1973, the day the Paris treaty was signed, the Marine Corps carried 138 personnel in an MIA/POW status. Since then, 66 status reviews have been conducted, all resulting in presumptive findings of death. Of the 66 status reviews, only two next-of-kin requested hearings. Twenty-six (26) Marines returned during the 1973 POW exchange. There are 46 Marine MIA/POW's remaining.

FURTHER, affiant sayeth not.

Matt J. Marshall
MATT J. MARSHALL
Major, USMC

Subscribed and sworn to before me this 16th day of September, 1977.

Notary Public
My commission expires 12-31-78

ATTACHMENT (1) TO MARSHALL AFFIDAVIT - NAVY DEPARTMENT REGULATIONS

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20350

Department of the Navy Regulations for Holding Hearings Whenever a Status Change is Considered Pursuant to the Payment to Missing Persons Act (37 U.S.C. §§ 551, et seq.)

1. Background. Pursuant to sections 555, 556, title 37, United States Code, the Secretary of the Navy or his designee is required, or may elect, to review the cases of those service members who have been carried in a missing status. In the case of McDonald v. McLucas, Civil No. 73 Civ. 3190 (S.D. N.Y. Feb. 14, 1974), a Federal court ordered a hearing and certain constitutional due-process safeguards as a prerequisite to any status changes. This directive implements the court decision.

2. Status Review. The review of the status of a service member of either the Navy or the Marine Corps will be conducted in the following manner:

(a) Each next-of-kin of each missing service member currently receiving governmental financial benefits which could be terminated by a status review will be notified whenever the status of the member will be reviewed and a status change is being actively considered.

(b) The next-of-kin entitled to notice of the status review will be notified of their right to attend a review hearing prior to the status review. Notification of the pending review, and of the right to attend a hearing prior to that review, will be made to the next-of-kin entitled to notice via certified mail, return receipt requested. The next-of-kin notified will be afforded 21 days from receipt of notification in which to respond whether they wish to elect any of the rights afforded. If, after 21 days, no response has been received, it will be presumed that the next-of-kin have elected not to exercise the rights afforded. If, however, the return receipt indicates that the next-of-kin never actually received notification, a reasonable attempt shall be made by letter or by other means to notify the next-of-kin, and the 21-day period shall begin only upon actual notification or when reasonable attempts to locate the next of kin have been terminated.

(c) Notification to the next-of-kin will indicate a scheduled date for the hearing, not earlier than 21 days after receipt of such notification, unless next-of-kin specifically agree to an earlier date. If the next-of-kin indicate this date is inconvenient, then the hearing may be rescheduled for a date within 10 days of the original scheduled date which is satisfactory to both the Navy or the Marine Corps and the next-of-kin. Upon written request by the notified next-of-kin, a reasonable delay in the hearing may be granted when it can be demonstrated that such delay would be meaningful to the status review or that such a delay would be essential in affording the next-of-kin the opportunity to exercise their rights. A request for delay must be in writing and it must be made to the office making the notification.

(d) The next-of-kin may attend the hearing with privately retained counsel if they choose.

(e) The next-of-kin entitled to notice will be afforded reasonable access to all information upon which the status review will be based. This information shall be compiled in a file which will be available for inspection by the next-of-kin, and counsel, at the appropriate Service Headquarters, Navy Department, Washington, D. C., during normal working hours on days prior to the scheduled hearing. Upon request, it may be reproduced and forwarded to next-of-kin upon payment of standard fees for this service.

(f) The next-of-kin entitled to notice will be afforded the opportunity before and during the hearing to present information which they consider relevant to the status review proceedings.

(g) The next-of-kin entitled to notice may exercise any or all of the rights afforded them. For example, the next-of-kin may waive their right to attend the review hearing alone, or by counsel, and still submit written information considered relevant to the status review proceedings prior to the scheduled hearing date.

(h) Hearings will be conducted at the offices of the appropriate Service Headquarters, Navy Department Washington, D.C. Costs incurred by the next-of-kin are not reimbursable by the Government.

(i) Hearings shall be conducted by a single hearing officer, appointed for that purpose.

(j) Comments or objections by the next-of-kin or their counsel to the information before the hearing officer, or to the hearing proceedings, shall be noted by the hearing officer.

(k) The hearing shall be closed to the public and limited in attendance to only those next-of-kin and their attorneys who have been afforded and elected the right of attendance. The hearing will be nonadversarial in nature and need not be recorded verbatim. The hearing may be tape-recorded, however, at the request of the next-of-kin. The agenda will be set by the hearing officer. Strict rules of evidence will not apply.

(l) The hearing officer, after his collection of information from Government records and from the next-of-kin, will forward this material to the review board. He shall include his opinion as to whether the missing service member is alive or dead, and his recommendation whether or not a status change should be made.

(m) Next-of-kin entitled to notice will be furnished, a brief statement of the facts upon which a status change was based.

(n) Next-of-kin entitled to notice who elect to waive any or all of their rights in connection with a hearing, but who prior to the hearing, decide to exercise any or all of them, shall be afforded the opportunity to exercise those rights.

26 March 1974

Approved J William Middendorf II

J. William Middendorf II
Acting Secretary of the Navy

A-114

ATTACHMENT (2) TO MARSHALL AFFIDAVIT - LETTER APPOINTING MARSHALL HEARING OFFICER

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
WASHINGTON, D.C. 20380

IN REPLY REFER TO
MSPA-1-4-sjb
3040
27 SEP 1975

From: Head, Personal Affairs Branch
To: Major Matt J. MARSHALL, USMC (Hearing Officer)

Subj: Appointment of Hearing Officer to conduct hearings, render opinions, and make recommendations to the Review Board with regard to a report of death or a presumptive finding of death or a continuation or change of status of Missing, Missing-in-Action or Captured/Detained personnel in Southeast Asia

Ref: (a) Department of the Navy Regulation dtd 26 March 1974

1. You are assigned duties as indicated opposite your name and in accordance with reference (a) and the following:

a. The Hearing Officer will review the status of Missing, Missing-in-Action or Captured/Detained personnel and/or their dependents prior to the expiration of twelve months of such absence or sooner should pertinent additional information be obtained that would warrant a review.

b. The Hearing Officer will notify each next of kin of each missing service member currently receiving governmental financial benefits which could be terminated by a status review whenever the status of the member will be reviewed and a status change is being actively considered.

c. The Hearing Officer will notify the next-of-kin entitled to notice of the status review of their right to attend a review hearing prior to the status review, with or without privately retained counsel. Hearings will be held at Headquarters, U. S. Marine Corps and conducted in Building 4, Henderson Hall, Arlington, Virginia. The hearings shall be closed to the public and limited in attendance to only those next-of-kin and their attorneys who have been afforded and elected the right of attendance. The hearing will be nonadversarial in nature and need not be recorded verbatim. The hearing may be tape-recorded, however, at the request of the next-of-kin. The agenda will be set by the hearing officer. Strict rules of evidence will not apply. Notification of the pending review, and of the right to attend a hearing prior to that review, will be made to the next-of-kin entitled to notice via certified mail, return receipt requested.

Subj: Appointment of Hearing Officer to conduct hearings, render opinions, and make recommendations to the Review Board with regard to a report of death or a presumptive finding of death or a continuation or change of status of Missing, Missing-in-Action or Captured/Detained personnel in Southeast Asia

d. The next-of-kin entitled to notice will be afforded reasonable access to all information upon which the status review will be based. This information shall be compiled in a file which will be available for inspection by the next-of-kin, and counsel, at Building 4, Henderson Hall, Arlington, Virginia, during normal working hours on days prior to the scheduled hearing.

e. The next-of-kin entitled to notice will be afforded the opportunity before and during the hearing to present information which they consider relevant to the status review proceedings.

f. The next-of-kin entitled to notice may exercise any or all of the rights afforded them. For example, the next-of-kin may waive their right to attend the review hearing alone, or by counsel, and, if they so waive, may nevertheless submit written information considered relevant to the status proceedings prior to the scheduled hearing date.

g. Comments or objections by the next-of-kin or their counsel to the information before the Hearing Officer, or to the Hearing proceedings, shall be noted by the Hearing Officer.

h. The Hearing Officer, after his collation of information obtained from Government records and from the next-of-kin, will forward this material to the Review Board. He shall include his opinion as to whether the missing service member is alive or dead, and his recommendation whether or not a status change should be made.

i. Next-of-kin entitled to notice will be furnished a brief statement of the facts upon which a status change was based.

j. Next-of-kin entitled to notice who elect to waive any or all of their rights in connection with a hearing, but who prior to the hearing decide to exercise any or all of their rights, shall be afforded the opportunity to exercise those rights.

MSPA-1-4-sjb
3040

Subj: Appointment of Hearing Officer to conduct hearings, render opinions, and make recommendations to the Review Board with regard to a report of death or a presumptive finding of death or a continuation or change of status of Missing, Missing-in-Action or Captured/Detained personnel in Southeast Asia

2. All previously issued appointments of Hearing Officers are hereby cancelled.

E. J. CONNELLY, JR.

Copies to:
MSPA Files

ATTACHMENT (3) TO MARSHALL AFFIDAVIT - HEARING OFFICER'S GUIDE

[illegible]

HEARING OFFICER'S GUIDE

by [illegible]

Purpose: This Guide is to assist the officer appointed to conduct a hearing held preliminary to a change in status of a member of the Armed Forces under the Payment to Missing Persons Act, Title 37, United States Code, sections 551 *et seq*. This Guide is to supplement regulations promulgated by the Secretary of the Navy on March 26, 1974, which are found attached hereto.

1. Opening the hearing.

A. The Hearing Officer shall call the hearing to order.

HO THIS HEARING SHALL COME TO ORDER. THE HEARING WAS CALLED TO ORDER BY MYSELF, ______________________________, UNITED STATES NAVY, AT ________ (time) ON ______________________, 19 __ (date), AT THE OFFICE OF THE BUREAU OF NAVAL PERSONNEL, DEPARTMENT OF THE NAVY, WASHINGTON, D.C. THE FOLLOWING PERSONS ARE PRESENT AT THIS TIME, ___________________________________ (list the persons present).

Comment

In his report to the status review board, the Hearing Officer should include in written form the above information.

B. The Hearing Officer should then state the purpose of the hearing.

HO THIS HEARING IS BEING HELD TO COLLECT INFORMATION WHICH MAY HAVE A BEARING ON THE CURRENT MISSING-IN-ACTION STATUS OF ____, UNITED STATES NAVY. INFORMATION COLLECTED BY THE HEARING OFFICER, ALONG WITH INFORMATION WHICH IS PRESENTED AT OR PRIOR TO THIS HEARING BY PERSONS NOW PRESENT, WILL BE COMPILED BY MYSELF AND SUBMITTED TO THE STATUS REVIEW BOARD. THE BOARD WILL USE THIS INFORMATION TO DETERMINE WHETHER A CHANGE IN THE OFFICIAL STATUS OF ________________________________ IS WARRANTED AT THIS TIME, THAT IS, WHETHER HE CAN REASONABLY BE PRESUMED TO BE LIVING. PERSONS PRESENT AT THIS HEARING MAY SUBMIT ANY INFORMATION WHICH THEY CONSIDER RELEVANT TO THIS MATTER. ANY COMMENTS WHICH PERSONS PRESENT AT THIS HEARING HAVE CONCERNING THE INFORMATION WHICH IS BEING COMPILED BY MYSELF WILL BE FORWARDED ALONG WITH THAT INFORMATION TO THE STATUS REVIEW BOARD.

Comment

The Hearing Officer should bear in mind that the purpose of the hearing includes the next-of-kin's right to present any information which the next-of-kin considers relevant to the status review proceedings. This does not preclude the Hearing Officer, in his discretion, from insisting that the information and comments submitted by the next-of-kin be noncumulative, and limited to the question of whether a status change is now warranted.

C. The Hearing Officer should then state the rights of those persons present at the hearing.

HO I WOULD NOW LIKE TO REMIND YOU OF THOSE RIGHTS WHICH YOU MAY EXERCISE DURING THIS HEARING. YOU MAY HAVE A LEGAL REPRESENTATIVE, RETAINED AT YOUR OWN EXPENSE, PRESENT DURING THE HEARING IF YOU SO WISH. YOU MAY ALSO VIEW THE INFORMATION WHICH WILL BE FORWARDED TO THE STATUS REVIEW BOARD FOR ITS CONSIDERATION. YOU MAY ALSO, IF YOU WISH, SUBMIT ADDITIONAL INFORMATION RELEVANT TO A POSSIBLE CHANGE IN STATUS TO THE STATUS REVIEW BOARD FOR ITS CONSIDERATION. ANY COMMENTS WHICH YOU MAY MAKE WILL BE RECORDED AND BE FORWARDED TO THE REVIEW BOARD, ALONG WITH ALL THE INFORMATION COMPILED TODAY.

Comment

The Hearing Officer should bring with him to the hearing the file of information which he has compiled which, along with the information and comments supplied by the next-of-kin or their attorney, will be forwarded to the status review board. This file should be available for inspection by the next-of-kin and their attorney during the hearing.

II. Conducting the hearing.

A. The Hearing Officer should indicate how the hearing will proceed.

HO I WOULD LIKE TO BEGIN BY READING A BRIEF SUMMARY OF THE EVENTS WHICH LEAD TO

____

BEING PLACED IN A MISSING-IN-ACTION STATUS, AND WHICH ALSO BEAR UPON A POSSIBLE CHANGE IN THAT STATUS AT THIS TIME. THIS SUMMARY IS EXTRACTED FROM THE INFORMATION CONTAINED IN THE FOLDER WHICH WILL BE FORWARDED TO THE REVIEW BOARD. IF YOU HAVE A QUESTION, PLEASE FEELFREE TO STOP ME AT ANY TIME. I WILL THEN RECEIVE ANY INFORMATION WHICH YOU WOULD ALSO LIKE SUBMITTED TO THE REVIEW BOARD.

Comment

The Hearing Officer should endeavor to answer all questions concerning the information which he has complied for submission to the review board. He should not, however, comment on the weight or the sufficiency of any information, either presented by the Government or the next-of-kin. Comments of this type made by the next-of-kin or their attorney, however, are considered relevant and should be submitted to the review board. The Hearing Officer should ask the next-of-kin or their attorney to put their comments in writing for submission, or if this is not possible, the Hearing Officer should include those comments in his own report.

When the Hearing Officer receives printed information submitted by the next-of-kin, he should briefly state for the record what the information is, and label it. For example: "I have received a letter dated 1 January 1974, which I will label tab A." Or "I have received a written

statement from Mrs. ______________________________________,
which I will label tab b."

The Hearing Officer should use his discretion to determine whether to ask other persons to participate in the hearing. He should do so when they are readily available and the Hearing Officer believes they can supply noncumulative information which will contribute to the status review board's determination. The next-of-kin have no right to demand the Government call others to supply information. The next-of-kin may, however, arrange at their own expense for the presence of persons who they feel can supply additional information relevant to the status review proceedings.

The Hearing Officer should also use his discretion to determine whether the hearing should be recessed or postponed after it has been called to order. He may do so if he believes that a delay would be meaningful to the status review or essential in affording the next-of-kin the opportunity to exercise their rights. Determining the length of any delay is also within the discretion of the hearing officer.

III. Closing the hearing.

HO THE HEARING IS ADJOURNED AT ______________ (time).

Comment

After closing the hearing, the Hearing Officer should compile the information submitted by both the Government and the next-of-kin, including any comments which the next-of-kin wished to have forwarded to the review board.

DECLARATION OF MAJOR WILLIAM L. ENGLAND, JR., FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EARL P. HOPPER, JR., by his father
and next friend, EARL P. HOPPER, SR.;
et al.,
Plaintiffs,

against-

JAMES E. CARTER, JR., President
of the United States, et al.,

Defendants.

Civil Action No.
77 C 1793
DECLARATION

WILLIAM L. ENGLAND, JR., Major, GS, U.S. Army, declares as follows:

1. I am the Chief, Status Determination Division, The Adjutant General Center, Headquarters, Department of the Army. In that capacity I have the responsibility for supervising the administration of Chapter 8, Army Regulation 600-10, the Army Casualty System. Army Regulation 600-10 is attached as inclosure 1. Section III, Chapter 8, Army Regulation 600-10 prescribes procedures for review at Headquarters, Department of the Army, of the status of service members reported as missing in accordance with Title 37, United States Code, Chapter 10.

2. Pursuant to Army Regulation 600-10, entitlement to notice and hearing is afforded to any person who is currently receiving Governmental financial benefits which could be terminated by a status review. Primary next of kin who are not currently receiving Governmental financial benefits which could be terminated by a status review also receive notice of status

review and hearing rights. An explanation of the due process rights afforded is included in the letter of notification. A sample notification letter is attached as inclosure 2. A Statement of Election rights is furnished with the notification letter. See page 8-6, Army Regulation 600-10. Individuals entitled to notice may elect any or all of the noted rights.

3. Those individuals afforded notice are also entitled to a hearing with or without an attorney at private expense.

4. An individual entitled to notice is afforded access to the information upon which the status review will be based. The information upon which the status review will be based includes:

(a) The proceedings of a Missing Persons Board of Inquiry which is conducted within 7 days after a report of missing to develop all factors surrounding the disappearance of a service member, to provide appropriate documentation, and to make a considered judgment as to the current status of the service member. See Chapter 8, Army Regulation 600-10.

(b) Intelligence information gathered by intelligence agencies, information gathered through negotiation efforts by the U.S. Government, information held by the Joint Casualty Resolution Center that pertains to possible recovery efforts of remains of the missing service member, any other information that the Department of the Army receives that might pertain to the loss of the service member.

5. An individual entitled to notice is afforded the opportunity before and during the hearing to present information he considers relevant to the proceedings. The information furnished is a part of the proceedings and is reviewed by both the Hearing Officer and the Adjutant General who, as the Secretary of the Army's designee, makes the decision as to the status of the missing service member.

6. If the person entitled to notice elects a hearing, the Adjutant General appoints a Hearing Officer in the grade of 0-4 or above. The hearing is closed to the public, is nonadversarial in nature, and limited in attendance to those individuals and their attorneys who have been afforded and elected the right to a hearing. A mechanical recording of the hearing is prepared but is transcribed only upon the request and at the expense of the requesting party. In any event a summarized record of the hearing is prepared in every case. The Hearing Officer is responsible for insuring that attendees are given the opportunity to review the information available to the Hearing Officer. He is also responsible for insuring that attendees are permitted to submit relevant information, to include the testimony of witnesses.

7. Upon completion of the hearing, all evidence presented by the attendees is made a part of the official record of proceedings and is reviewed by members of a Status Review Board. Members of the Status Review Board are appointed on orders by the Adjutant General. Each member of the Status Review Board reviews the proceedings and makes a recommendation as to status change. The Hearing Officer then reviews the recommendations of the Status

Review Board, and the entire record of proceedings. The Hearing Officer advises the attendees of his recommendation and supporting reasons and their right to present objections which will be incorporated in the record forwarded to The Adjutant General. Any objection must be presented to the Hearing Officer within ten days following the date the attendees are informed of the Hearing Officer's recommendation. An entension of time may be granted by the Hearing Officer upon good cause shown.

8. The Hearing Officer then submits the complete record with his recommendation and supporting reasons to the Adjutant General who as designee of the Secretary of the Army, makes a decision as to the status of the service member. The determination may be appealed to the Army Board for the Correction of Military Records pursuant to 10 U.S.C. 1552.

9. I declare under penalty of perjury that the foregoing is true and correct.

William L. England Jr.
WILLIAM L. ENGLAND, JR.

A-126

ATTACHMENT (1) TO ENGLAND DECLARATION -
ARMY REGULATION 600-10

Army Regulation
No. 600–10

HEADQUARTERS
DEPARTMENT OF THE ARMY
Washington, DC *15 January 1976*

PERSONNEL—GENERAL

THE ARMY CASUALTY SYSTEM

Effective 1 May 1976

This revision reorganizes, updates, and clarifies previous text. Included are chapters on processing USAR and ARNG casualties and on preparing DD Form 93 (Record of Emergency Data). Local limited supplementation is permitted, but is not required. If supplements are issued, Army Staff agencies and major Casualty Area Commands will furnish one copy of each supplement to HQDA(DAAG-PEC) WASH DC 20314; other commands will furnish one copy of each to the next higher headquarters.

			Paragraph	Page
Chapter	1.	GENERAL		
		Purpose	1–1	1–1
		Applicability	1–2	1–1
		Reports control exemption	1–3	1–2
		Release of information	1–4	1–2
		Casualty-related terms	1–5	1–2
		Determination of date of death	1–6	1–2
Chapter	2.	CASUALTY REPORTING SYSTEM		
Section	I.	General		
		Principles of reporting	2–1	2–1
		Types of casualty reports	2–2	2–1
	II.	Initial Reports and Status Change Reports		
		General	2–3	2–1
		When to submit initial and status change reports	2–4	2–1
		Reporting a person as dead	2–5	2–1
		Reporting a person as undetermined	2–6	2–2
		Reporting a person as missing	2–7	2–2
		Reporting a change in status of missing person	2–8	2–2
		Reporting a person as wounded, injured, or ill	2–9	2–2
	III.	Supplemental Reports		
		General	2–10	2–3
		Missing persons	2–11	2–3
	IV.	Progress Reports		
		General	2–12	2–3
		When required	2–13	2–3
		Termination of reporting requirements	2–14	2–4
		Content of reports	2–15	2–4
	V.	Health and Welfare Reports		
		General	2–16	2–4
		Health and welfare reports, hostile areas (STATREP)	2–17	2–4
		Hoax cases	2–18	2–5

---

*This regulation supersedes AR 600–10, 29 Mar 72, including all changes; change 1, AR 608–2, 27 Aug 75 and chapter 2, AR 608–2, 10 Oct 73; AR 135–31, 28 Feb 69; DA message DAAG–CAC 201715Z Jun 75, subject: Interim Change to AR 600–10 (The Army Casualty System); DA message DAAG-CAC 201630Z Nov 73, subject: Interim Change to AR 600–10; DA message DAAG-CAC 041500Z Apr 75, subject: Casualty Reporting; DA message DAAG-CAC 072214Z Mar 75, subject: Submission of Progress Reports; DA message DAAG-CAC 071800Z Feb 75, subject: Casualty Reporting—Stray; DA message DAAG-CAC 231603Z Jul 74, subject: Casualty Reporting; DA message 121630Z Jun 73, subject: Change in Casualty Report Items; DA message DAAG-CAC 191500Z Apr 74, subject: Change to AR 600–10, The Army Casualty System; DA message DAAG-CAC 281345Z May 75, subject: Interim Change to AR 608–2 (SGLI and Record of Emergency Data); NGR 608–2, 21 Oct 74; and NGR 638–1, 18 Jan 75.

incl 1

Paragraph Page

CHAPTER 3. PREPARATION OF CASUALTY REPORTS

General ---- 3-1 3-1
Addresses for casualty reports ---- 3-2 3-1
Security classification ---- 3-3 3-1
Dispatch of reports ---- 3-4 3-1
Report of delivery ---- 3-5 3-1
Casualty report codes ---- 3-6 3-1
Casualty report items ---- 3-7 3-1
Format of reports ---- 3-8 3-2
Preparation of the report when the individual is away from the station of assignment ---- 3-9 3-2
Casualty reporting for other US Armed Forces ---- 3-10 3-2
Reporting for allied governments and reporting foreign national students ---- 3-11 3-2
Casualty reporting on nonmilitary personnel residing overseas ---- 3-12 3-3

CHAPTER 4. CASUALTY REPORTING UNDER SPECIFIED CIRCUMSTANCES

Section I. Special Interest Casualty Matters

General ---- 4-1 4-1
Additional requirements in special interest casualty matters ---- 4-2 4-1

II. Casualty Reporting During Civil Disturbances

Responsibilities ---- 4-3 4-1
Categories of casualties to be reported during a civil disturbance ---- 4-4 4-2
Reporting procedures ---- 4-5 4-2
Statistical data ---- 4-6 4-3

III. Casualty Reporting Under Other Specified Circumstances

Casualty reporting during hostilities ---- 4-7 4-3
Casualty reporting during movements by military air or sea to and from oversea commands ---- 4-8 4-3
Casualty reporting during field exercises ---- 4-9 4-3
Casualty reporting during an attack on CONUS ---- 4-10 4-3
Prisoners of war in US Army custody ---- 4-11 4-3
Civilian internees in US Army custody ---- 4-12 4-4

CHAPTER 5. NOTIFICATION OF NEXT OF KIN

Section I. General Notification Policies

General ---- 5-1 5-1
Policies ---- 5-2 5-1
Conflicting evidence ---- 5-3 5-1

II. Notification of NOK of Deceased and Missing Personnel

General ---- 5-4 5-1
Responsibilities for notification ---- 5-5 5-1
Personnel resources ---- 5-6 5-2
Persons to be notified ---- 5-7 5-2
Notification procedures ---- 5-8 5-3
Adverse medical reaction brought about by notification ---- 5-9 5-3
Command procedures ---- 5-10 5-3
Exceptions ---- 5-11 5-4

III. Notification of NOK of Reportable Wounded, Injured, or Ill Personnel

General ---- 5-12 5-5
Commanders responsible for notification ---- 5-13 5-5
Method of notification ---- 5-14 5-5
Notification desires of the individual ---- 5-15 5-5
Information to be provided ---- 5-16 5-5

CHAPTER 6. PREPARATION OF LETTERS OF SYMPATHY, CONDOLENCE AND CONCERN

Section I. Letters of Sympathy

General ---- 6-1 6-1
To whom letters of sympathy will be sent ---- 6-2 6-1
Responsibilities for preparation of letters of sympathy ---- 6-3 6-1
Procedures for preparation of letters of sympathy ---- 6-4 6-1
Content of letters of sympathy ---- 6-5 6-2
Review and dispatch of letters of sympathy ---- 6-6 6-3

Paragraph Page

II. Letters of Condolence

General 6-7 6-3
Responsibilities for preparation of letters of condolence 6-8 6-3
Dispatch of letters of condolence 6-9 6-3
Review of letters of condolence 6-10 6-3
Section III. Letters of concern 6-11 6-3

CHAPTER 7. CASUALTY ASSISTANCE

Section I. General

Objectives of the casualty assistance program 7-1 7-1
Persons entitled to assistance 7-2 7-1
Responsibilities of CAC's and major oversea commanders in the casualty assistance program 7-3 7-2
Responsibilities of senior Army representatives in other areas 7-4 7-2
Assignment and transfer of assistance cases 7-5 7-2
Transportation 7-6 7-2
Casualty assistance kits 7-7 7-3

II. Assistance to the NOK of Deceased Individuals

General 7-8 7-4
Responsibilities of commanders 7-9 7-4
Responsibilities of the SAO 7-10 7-4
Payment of maximum partial death gratuity 7-11 7-5
Assistance at national and post cemeteries outside areas of responsibility 7-12 7-6
Assistance to the NOK of retired persons 7-13 7-6
Assistance to the NOK of civilian employees 7-14 7-6
Disposition of survivor assistance reports 7-15 7-6

III. Assistance to the NOK of Missing/ Captured Persons

General 7-16 7-7
Responsibilities of commanders 7-17 7-7
Continuity of assistance 7-18 7-7
Responsiblities of the FSAO 7-19 7-7

CHAPTER 8. INQUESTS AND MISSING PERSONS BOARDS OF INQUIRY

Section I. Inquests

Purpose of inquest 8-1 8-1
Responsibilities for initiating the inquest 8-2 8-1
Conduct of the military inquest 8-3 8-1
Disposition of reports of inquest 8-4 8-1

II. Missing Persons Boards of Inquiry

Purpose of the missing persons board of inquiry 8-5 8-1
Appointment of a board of officers 8-6 8-2
Conduct of the board of inquiry 8-7 8-2
Recommendations of the board 8-8 8-2
Report of board proceedings 8-9 8-2
Action by the convening authority 8-10 8-3
Second board of inquiry for individuals missing longer than 1 year 8-11 8-3

III. Status Review by HQDA

Reason for status review 8-12 8-4
Conduct of the review 8-13 8-4
Costs incurred by the attending NOK 8-14 8-5

CHAPTER 9. REPORTS OF DEATH OF USAR MEMBERS

General 9-1 9-1
Responsibility 9-2 9-1
Procedures 9-3 9-1
DD Form 1300 (Report of Casualty) 9-4 9-1

CHAPTER 10. REPORTS OF DEATH FOR ARNG MEMBERS

Section I. General

General 10-1 10-1
Official report of death 10-2 10-1

II. Death While Participating in Training or as a Result Thereof

Notification of death 10-3 10-1
Notification of next of kin 10-4 10-1
Line of duty investigations 10-5 10-1

Paragraph Page

Care and disposition of remains 10-6 10-1
Disposition of records 10-7 10-1
Servicemen's Group Life Insurance (SGLI) Certification of Eligibility 10-8 10-2
III. Death While Not in Duty Status
Notification of death 10-9 10-2
Distribution of DD Form 1300 .... 10-10 10-2
Disposition of records 10-11 10-2
SGLI Certification of Eligibility 10-12 10-2
CHAPTER 11. RECORD OF EMERGENCY DATA (DD FORM 93 and DA FORM 41)
Purpose of DD Form 93 and DA Form 41 .... 11-1 11-1
Preparing DD Form 93 and DA Form 41 .... 11-2 11-1
Review and update 11-3 11-1
Disposition 11-4 11-1
Confidential data 11-5 11-1
Transmittal of forms 11-6 11-1
Use of DD Form 93 .... 11-7 11-2
Use of DA Form 41 .... 11-8 11-2
DD Form 93, Privacy Act Statement 11-9 11-2
Disposition of remains 11-10 11-2
CHAPTER 12. OBTAINING PERSONAL INFORMATION FROM THE NOK OF A DECEASED SERVICE MEMBER
General 12-1 12-1
Advisement 12-2 12-1
APPENDIX A. GUIDANCE TO INDIVIDUAL MAKING PERSONAL NOTIFICATION A-1
B. AREAS OF RESPONSIBILITY—CASUALTY AREA COMMANDS B-1
C. AREAS OF RESPONSIBILITY—MAJOR OVERSEA COMMANDERS C-1
D. LIST OF PUBLICATIONS AND FORMS TO BE INCLUDED IN CASUALTY ASSISTANCE KITS D-1

CHAPTER 1
GENERAL

1-1. Purpose. This regulation establishes policies and outlines responsibilities and procedures for the efficient operation of the Army casualty system.

1-2. Applicability. The Army casualty system applies to those personnel for whom the Army has assumed responsibility. The extent to which this regulation applies depends upon the status and location of the individual at the time he or she becomes a casualty.

a. This regulation specifically applies to—

(1) The following military personnel:

(*a*) Members on active duty of the Regular Army (RA), Army of the United States (AUS), and Army National Guard of the United States (ARNGUS), and members of the US Army Reserve (USAR) on active duty, extended active duty, active duty for training, or full-time training duty.

(*b*) Members en route to, from, and participating in annual training (AT), active duty for training (ADT), or scheduled inactive (Reserve) duty training (IDT).

(*c*) Members en route to, from, or at a place for final acceptance by or entry on active duty with the Army.

(*d*) US Military Academy (USMA) and Reserve Officers' Training Corps (ROTC) cadets.

(*e*) Members of other US Armed Forces.

(*f*) A prior Army member who dies within 120 days after his/her separation or discharge will be reported upon receipt of information or upon request by HQDA.

(*g*) Members of the ARNG and USAR who are not in a status shown in (*a*) through (*c*) above (except USAR general officers) will be reported in accordance with the provisions of chapter 9 (USAR) or chapter 10 (ARNG).

(2) Retired Army members:

(*a*) Those members who die within 120 days after being retired from active service or for disability, or after being placed on the Temporary Disability Retired List will be reported to HQDA.

(*b*) All other members (except general officers) who are retired and are receiving pay, including those retired at age 60 with 20 years' qualifying service (Title III), will be reported to the Commander, US Army Reserve Components Personnel and Administration Center (RCPAC), 9700 Page Boulevard, St. Louis, MO 63132, with information copy furnished HQDA (DAAG-PEC) WASH DC 20314.

(3) US civilians outside CONUS, both appropriated and nonappropriated fund employees of Department of the Army; contract field technicians; visiting dignitaries; and representatives of Department of the Army-sponsored organizations, such as the American Red Cross, the United Services Organization, and banking facilities. This category may also include those citizens for whom local State Department officials have requested the oversea command to assume casualty reporting responsibilities and contract representatives of the Veterans Administration and the Department of Labor.

(4) Dependents located with their sponsor overseas and those dependents who die in CONUS when the sponsor is overseas (1) and (3) above). A next of kin who is not a dependent but is visiting a sponsor overseas at the time of death may be reported upon request of the sponsor to the local command.

(5) Foreign nationals, both military and other officials, performing full-time duty with the US Army or in the United States under the auspices of the Army as students or on orientation tours. Those personnel of allied nations who are patients in, or for whom administrative responsibility has been assumed by, any US Army medical treatment facility

(MTF) will be reported as appropriate (AR 40-2).

b. The reporting requirements of this regulation do not apply to Army members attached to another service of the Armed Forces. Those members will be reported by that service under its regulation.

c. The provisions of this regulation do not apply to prisoners of war (PW) who are under US Army control. Such PWs are covered in AR 633-50.

1-3. Reports control exemption. The reports, notifications, and verifications prescribed in this regulation are exempt from reports control action under the provisions of paragraph 7-2*h*, AR 335-15.

1-4. Release of information. Guidelines regarding public release of casualty information are contained in AR 360-5.

1-5. Casualty-related terms. a. Except as noted below, all casualty-related terms appearing in this regulation are as defined in AR 310-25.

b. The following terms have special meaning within this regulation:

(1) *Presumptive finding of death (PFOD).* A finding made by The Adjutant General, under the Missing Persons Act (chap. 10, title 37, U.S.C), when the circumstances surrounding the disappearance of an Army member plus the expiration of at least 1 year lead to the logical conclusion that the member is no longer alive, although the available evidence may be insufficient to establish the date on which the member died.

(2) *Next of kin (NOK).* An individual's nearest relative(s) in the following line of succession:

(*a*) Spouse.

(*b*) Sons or daughters in the order of seniority.

(*c*) Oldest parent unless legal custody was granted to another person by reason of a court decree or statutory provision.

(*d*) That blood or adoptive relative of the individual who was granted legal custody of the individual by reason of a court decree or statutory provision.

(*e*) Brothers or sisters in the order of seniority.

(*f*) Oldest grandparent.

(*g*) Other relatives in order of relationship to the individual in accordance with the laws of the deceased's domicile.

(*h*) Person in loco parentis.

(3) *Primary next of kin (PNOK).* The legal next of kin. That person of any age most closely related to the individual according to the line of succession shown in (2) above. Seniority, as determined by age, will control when the persons are of equal relationship.

(4) *Adult next of kin (ANOK).* That adult highest in the line of succession shown in (2) above, except that a spouse who is a minor will be considered the adult next of kin.

(5) *Secondary next of kin (SNOK).* Any next of kin other than the primary next of kin.

(6) *Missing person.* Any person who is declared to be in one of the categories established by the Missing Persons Act; i.e., beleaguered, besieged, captured, detained, interned, missing, or missing in action.

(7) *Casualty area commander (CAC).* The commander assigned responsibility for the area in which the casualty occurs in CONUS. Areas of responsibility are contained in AR 5-9. (See app B of this regulation for areas of responsibility.)

(8) *Major oversea commander.* The commander assigned responsibility for the area in which the casualty occurs overseas. Areas of responsibility are contained in appendix C.

(9) *HQDA.* For the purpose of this regulation HQDA means Personal Affairs Directorate, HQDA (DAAG-PEC), Wash DC 20314.

1-6. Determination of date of death. When all available evidence does not establish the actual date of death, the latest date on which death can reasonably be presumed to have occurred will be selected as the date of death. Consequently, when it is established that death occurred during a specific month but there is insufficient evidence to establish the actual date of death, the last day of the month will normally be selected as the date of death. However, when the individual was absent with authority at the time of disappearance and there is no evidence of unauthorized absence or other evidence to the contrary, the last day of the period of authorized absence will be selected as the date of death. This is done so that the individual will not be unjustifiably considered absent without leave on the date of death. If the report of death shows an abnormal length of time between the date a person was reported absent and the date selected as the date of death, the circumstances on which the selection of the latter date was based will be included in the report.

CHAPTER 8

INQUESTS AND MISSING PERSONS BOARDS OF INQUIRY

Section I. INQUESTS

8-1. Purpose of inquest. The purpose of an inquest is to establish the cause, place, date, or circumstances of the death of an individual when one or more of these items is not known. An inquest also serves as a means of documenting the facts concerning the death of an individual and as a basis for providing information to the NOK.

8-2. Responsibilities for initiating the inquest. *a. For deaths occurring on a military installation.* If the complete details of the death are not known, the commander of the installation at which the individual is found dead will, as quickly as possible after discovery of the death, appoint a summary court officer to conduct an inquest. The officer appointed to conduct the inquest will be a field grade officer who is senior in rank to the deceased, unless directed otherwise by HQDA.

b. For deaths occurring away from a military installation. When an individual dies under unusual circumstances while away from a military installation or in an area under the jurisdiction of a foreign government, the individual's commander or the commander responsible for submitting the casualty report will request that the appropriate civilian authorities conduct an inquest or similar investigation to determine the facts surrounding the individual's death.

8-3. Conduct of the military inquest. *a.* The summary court officer will make his conclusions on the basis of evidence presented by law enforcement agencies (military and civilian) and from the questioning of witnesses, including the medical officer or the civilian physician who examined the remains. The testimony of each witness will be placed in writing, subscribed to under oath, and appended to the report of inquest.

b. If an autopsy is necessary to ascertain the exact cause and time of death, the summary court officer will immediately notify the appointing authority so that arrangements can be made to perform the autopsy.

8-4. Disposition of reports of inquest. *a. In CONUS.* For deaths occurring in CONUS, the summary court officer will submit a written report of the inquest to the commander who initiated the action. That commander will review the report for completeness and forward it as indicated below.

(1) If all the NOK to be notified are located in CONUS, the report will be sent to HQDA through command channels.

(2) If there are NOK to be notified outside of CONUS, a summary of the report of inquest will be sent to HQDA within 48 hours after receipt in the form of a supplemental casualty report.

b. Overseas. For deaths occurring overseas, a summary of the results of the inquest will be forwarded to HQDA in a supplemental casualty report within 48 hours of receipt of the inquest by the major oversea commander or the senior Army representative.

Section II. MISSING PERSONS BOARDS OF INQUIRY

8-5. Purpose of the missing persons board of inquiry. A missing persons board of inquiry is convened to develop all factors surrounding the disappearance of an individual previously reported under the provisions of this regulation as a missing person, to provide appropriate documentation of those factors, and to make a considered judgment based upon a review of those facts as to the current status of the individual. Further, the report of the board proceedings provides the basis for furnishing information to the NOK, responding to official inquiries, and conducting subsequent required reviews at DA level for those individuals who have been continued in a missing status.

8–6. Appointment of a board of officers. Within 7 days after an individual has been reported to DA as missing, a board of officers will be appointed to inquire officially into the status of the missing person. This board will be appointed by the commander having general court-martial jurisdiction over the unit to which the missing individual was assigned (or a higher authority designated by a commander authorized to make such designation). If no general court-martial authority exists, the appointment will be made by the commander reporting directly to HQDA.

a. A single board will consider the status of all individuals who were involved in the same incident and whose whereabouts and status are uncertain. When the subjects of this board of inquiry are from organizations under different general court-martial jurisdiction, the commanders exercising general court-martial jurisdiction will coordinate to determine which one will convene the board of inquiry, as well as the composition of the board.

b. The board will consist of not less than three commissioned officers. At least one of these officers will be senior to the person whose status is being inquired into or in the grade of major, whichever is higher.

8–7. Conduct of the board of inquiry. The board of inquiry will be conducted in accordance with AR 15–6. In addition, the following rules apply:

a. When an aircraft crash or disappearance of an aircraft is involved, witness statements or flight manifest must be obtained which specifically place the individual aboard the aircraft at the time of the incident.

b. When the death of the person being considered is a possibility, conclusive proof of death must be established. Conclusive evidence of death must be more than an indication of death. The facts must be such that death is the only plausible alternative under the circumstances.

8–8. Recommendations of the board. Based upon the investigation, the board will recommend that the individual's status be continued as missing, or be changed to another category provided in the Missing Persons Act, to dead, or to another appropriate status.

8–9. Report of board proceedings. The report of board proceedings will be submitted on DA Form 1574 (Report of Proceedings by Investigating Officer (Board of Officers)). The original copy of the report will be forwarded to the convening authority so as to arrive within 8 days after the board is appointed.

a. The following will be included in or with the report of board proceedings:

(1) Information concerning the duration, extent, and results of searches for the missing individual.

(2) A copy of the unit commander's letter of sympathy (circumstances) to the NOK.

(3) The names, identification, and original sworn statements from all persons who have knowledge of the circumstances of the disappearance.

b. In addition, if the individual is missing, captured, or detained as the result of armed conflict, the following documents and records will be submitted with the report of proceedings:

(1) A copy of the most recent official, or other, photograph available of the individual.

(2) A map of the area in which the individual(s) disappeared.

(3) If an aircraft incident is involved, a photograph or sketch of the crash site should be included.

(4) When remains are not recovered, survivors should indicate the extent of injuries or wounds they noted on the missing indi-

viduals. This information should be placed on the sketch.

(5) A summary or reproduction of individual's medical and dental records, giving complete identification data.

(6) A copy of the individual's DA Form 2-1 (Personal Qualification Record).

(7) Extract of orders directing individual's unit of assignment.

(8) VA Form 29-8286 (Servicemen's Group Life Insurance Election) or DA Form 3054 (SGLI Election) completed by the individual.

(9) Copy of the individual's DD Form 93 or DA Form 41.

(10) Any other information or material concerning the individual which was received after he became a casualty.

8-10. Action by the convening authority. The convening authority will review the report of proceedings for completeness before forwarding the report to higher headquarters.

a. If the report is incomplete or if an administrative error has been made, the convening authority may return the report for further action by the board. However, the report will not be returned to the board solely because the convening authority does not agree with the recommendations of the board.

b. If the report is complete, the convening authority may agree with the recommendations of the board or, if the convening authority disagrees, may enter recommendations based on a review of the report. The convening authority will then accomplish one of the following actions:

(1) If the convening authority agrees with the recommendation of the board (or if he provides the recommendation) that the individual's status as a missing person be continued, the original copy of the report of the board proceedings will be forwarded through channels to HQDA so as to arrive within 30 days after the date of the initial missing person's report if the incident occurred in CONUS or within 45 days after the date of the initial missing person's report if the incident occurred overseas. HQDA will review the report of proceedings and make final determination of status under the Missing Persons Act. The determination will be announced through channels to the convening authority.

(2) If the convening authority agrees with the recommendation of the board (or provides the recommendation) that the individual's status be changed to deceased (remains not recovered), an electrically transmitted STACH report will be submitted to HQDA by the commander who submitted the initial missing person report. The report of board proceedings will be forwarded through channels to HQDA (time limits as in (1) above).

(3) If the convening authority agrees with the recommendation of the board (or provides the recommendation) that the individual's status be changed to AWOL, an electrically transmitted SUPP report will be submitted to HQDA by the commander who submitted the initial missing person's report.

8-11. Second board of inquiry for individuals missing longer than 1 year. *a.* When an individual has been in a missing status for 11 months, the original convening authority will appoint another board of officers to evaluate the recommendations of the previous board of inquiry and any additional related data which have been accumulated. If, during the period since the individual became missing, the command represented by the convening authority has been reassigned to another major command or has been inactivated, the next senior headquarters of the original convening authority will cause the second board of inquiry to be appointed and convened. The convening authority will submit the results of this review, with appropriate recommendations through channels to HQDA so as to arrive not later than 15 days prior to the anniversary of the incident.

b. HQDA will make the final determination of status. The convening authority and others in reporting channels will be notified by HQDA of the determination made. Determinations under the provisions of the Missing Persons Act (Pub L. 89-554, 37 U.S.C.) are made in The Adjutant General's office pursuant to authority delegated by the Secretary of the Army. This authority includes the responsibility to—

(1) Make all determinations of death and other status and of essential dates (except determinations of fact of dependency) necessary to administration of the Act.

(2) Review the cases of persons missing or missing in action; direct continuance of the missing status; change status to another category provided by the Missing Persons Act; or issue presumptive "Findings of Death" and determine the date upon which death will be presumed to have occurred, under the provisions of section 555, title 37, United States Code.

(3) Make all determinations necessary under the provisions of section 556, title 37, United States Code. For the purpose of the Act, determinations so made will be conclusive as to death or findings of death, or as to any other status included or incorporated in the Act. The determination will be conclusive as to whether information received on any person is to be construed and acted on as an official report.

Section III. STATUS REVIEW BY HQDA

8-12. Reason for status review. Pursuant to chapter 10, Title 37, United States Code, the Secretary of the Army or his designee may elect to review the case of those service members who have been carried in a missing status. This review may be accomplished for the following reasons:

a. The passage of time without any information which could relate to the likelihood of the member's return to military control;

b. The unavailability of any information from intelligence sources regarding the status of the service member;

c. The return to military control of other PW/MIA personnel and the lack of knowledge on their part of any information relating to the status of the missing member;

d. The remains of the missing personnel being recovered and positively identified; and

e. Such other circumstances as the Secretary of the Army or his designee deems to warrant a review.

8-13. Conduct of the review. The review of the status of the service member will be conducted in the following manner:

a. The NOK currently receiving Governmental financial benefits which could be terminated by a status review will be notified that the status of the member will be reviewed. (In the event there are no next of kin eligible for notice of the pending review, the Secretary of the Army may afford the same rights to the PNOK (as defined in para 1-5*b*(3)) as though the PNOK were entitled to notice.)

b. NOK entitled to notice will be afforded the opportunity to attend a hearing, with or without a privately retained lawyer, in conjunction with this review.

c. NOK entitled to notice will be afforded reasonable access to the information upon which the status review will be based. Documents classified under the criteria specified in DOD 5200.1-R and AR 380-5 will not be made available to the NOK or to the Hearing Officer. However, every effort will be made to either downgrade the information which is classified or to present it in such a manner as to warrant removal of protective markings. (This may be accomplished by removing that portion of the information which caused it to be classified (such as the location of loss of the service member, the type mission in which he was involved, the source or collection means of the intelligence data) or by unclassified summary.) In the event classified information cannot be downgraded or presented as aforementioned, the classified information will not be made available to the Hearing Officer and may not be considered in the course of the review. Assistance will be provided by the Assistant Chief of Staff for Intelligence, DA, to insure that security procedures and data are not compromised.

d. NOK entitled to notice will be afforded the opportunity before and during the hearing to present information which they consider relevant to the proceedings. NOK entitled to notice will be furnished, upon their written request, a brief statement of the facts upon which the status review will be based.

e. NOK entitled to notice may elect to exercise any or all of the rights set forth above. Notification of the pending review will be made to the NOK entitled to notice via certified return receipt requested mail. A reply to this notification indicating the desires of the NOK will be made to the notifying office (fig 8–1). The NOK notified will be afforded 21 days from the receipt of notification in which to make an election of the above rights. If no response is received, it will be presumed that the notified NOK have elected not to exercise the rights provided. NOK who are notified will be furnished preaddressed indicia envelopes for the purpose of acknowledging the notification of review and electing or waiving applicable rights.

f. If notified NOK elect to attend a hearing, with or without a privately retained lawyer, a hearing date will be established and the NOK making the election will be informed. Upon written request by notified NOK, a delay in the review may be granted when it can be demonstrated that such a delay would be meaningful to the review or that such a delay would be essential in affording the NOK the opportunity to exercise their rights. A request for delay must be in writing and it must be made to the office conducting the notification. The Adjutant General will appoint a Hearing Officer who will be a commissioned officer in the grade of 0–4 or above. The hearing will be closed to the public, limited in attendance to only those NOK and their attorneys who have been afforded and elected the right of attendance, and nonadverse in nature. A mechanical recording of the hearing will be prepared but will be transcribed only upon request of and at the expense of the requesting party. However, a summarized record of the hearing will be prepared in every case. The hearing agenda will be set by the Hearing Officer. Neither AR 15–6 nor strict rules of evidence apply. The inquiry will be confined to matters of official record and such evidence, to include testimony of witnesses, as the attending NOK may present. The Hearing Officer will insure that attendees are given the opportunity to review the information from official records to be considered in the hearing, that NOK attending are permitted to submit relevant information, and that NOK attending are informed of the final recommendation of the Hearing Officer and the reasons therefor. If requested by the Hearing Officer, the Judge Advocate General will provide an attorney to be present at the hearing to provide legal advice to the Hearing Officer. If requested by the Hearing Officer, the Director, Personal Affairs Directorate, TAGCEN, will provide a representative who is skilled in the forensic sciences and the identification processes used within that organization.

g. NOK who have attended the hearing will be furnished, upon their request, a complete copy of the summarized record of the hearing, together with the recommendation and supporting reasons to be furnished to The Adjutant General.

h. If NOK who have attended the hearing or their privately retained lawyer object to the recommendations of the Hearing Officer, the objections to the recommendations of the Hearing Officer will be incorporated in the file sent forward to The Adjutant General. These objections must be presented to the Hearing Officer within 10 calendar days following the date the attending NOK are informed of the Hearing Officer's recommendations so that a decision by The Adjutant General will not be unnecessarily delayed. An extension of this time may be granted by the Hearing Officer if good cause is shown.

i. The Hearing Officer will submit the summarized record of the hearing, together with his recommendations and supporting reasons and the NOK objections, to The Adjutant General who, as designee of the Secretary of the Army, will make a decision as to the status of the missing service member.

8–14. Costs incurred by the attending NOK. Cost incurred by the attending NOK, to include travel, lodging, local transportation, legal fees, transcription costs, witness expenses, and other expenses, will be borne by the attending NOK and will not be reimbursed by the Government.

ELECTION OF RIGHTS

AFFORDED BY THE SECRETARY OF THE ARMY

IN CONNECTION WITH HIS REVIEW OF THE CASE OF

____

NAME SSN

Please check and initial all applicable statements

☐ __________(I, We) have read and understand the rights which (I, We) have been afforded as stated in the letter with which this form is enclosed.

☐ __________(I, We) further acknowledge notice of the pending review of the case of the serviceman named above, who is (my, our) ______________.

☐ __________(I, We) do hereby elect to waive all of the rights afforded (me, us) in connection with the pending review of the status of (my, our) ______________.

(I, We) Desire:

☐ __________a. To be furnished a brief statement of the facts upon which the status review will be based.

☐ __________b. To attend the hearing.

☐ __________c. To attend the hearing with a privately retained lawyer.

☐ __________d. To have reasonable access to the information from official records upon which status review will be based.

__________e. To have the opportunity to present any information which is considered relevant to the proceeding.

SIGNATURE(S)	RELATIONSHIP TO SERVICEMAN NAMED ABOVE	DATE
______________	______________	________
______________	______________	________

NOTE: This form must be returned within 21 days of receipt by you. An envelope for this purpose is provided. In the event no response is received from you within the time specified, it will be presumed that you have waived the above specified rights.

DA (DAAG-PES)
WASH DC, 20314

Figure 8-1

ATTACHMENT (2) TO ENGLAND DECLARATION - NOTICE OF STATUS REVIEW AND HEARING RIGHTS

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL AND THE ADJUTANT GENERAL CENTER
WASHINGTON, D.C. 20314

DAAG-PES

Dear

Under the provisions of the Missing Persons Act, Title 37, United States Code, the Secretary of the Army is prepared to review the casualty status of your husband,

Pursuant to Army Regulation 600-10, the Secretary is required, in connection with this review, to afford you the following rights:

a. Notice of the pending review of the case, which this letter constitutes;

b. A reasonable opportunity to attend a hearing;

c. To attend the hearing with a lawyer (retained at your own expense);

d. Reasonable access to the information which the status review will be based; and

e. The opportunity to present any information which you consider relevant to the proceedings.

You may waive any or all of the above rights by completing the inclosed form in your handwriting, signing and mailing it in the pre-addressed envelope provided. The address is also shown at the bottom of the form. Upon receipt of your decision to waive these rights, the Secretary of the Army will proceed with a review of case and will inform you of his action based upon the review.

incl 2

If you elect to exercise your right of attendance at a hearing, you will be contacted upon receipt of your decision so that a convenient hearing date can be arranged for you. A lapse of 21 days, following your receipt of this letter, without our having received your decision will constitute your waiver of all of the above rights which you have been afforded in connection with the review. In any event whether or not you exercise any or all of the above rights, we will provide you with a summary of circumstances which were considered by the reviewing board and which resulted in the action by the Secretary.

The Secretary of the Army has published an addition to Department of the Army Regulation 600-10, The Army Casualty System, which provides for the regulatory procedures associated with the conduct of status reviews of missing service members. An extract of the pertinent section of this regulation is provided as an inclosure to this letter.

I know that for you this is a most difficult period. If we can be of any further assistance, please contact us at any time.

Sincerely,

3 Incl
As stated

T. C. SHAYLOR
Colonel, GS
Director, Personal Affairs

AFFIDAVIT OF COMMANDER JOHN G. COLGAN, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

EARL P. HOPPER, JR., by his father and next friend, EARL P. HOPPER, SR.; et al., Plaintiffs,	
v.	Civil Action No. 77 C 1793
JAMES E. CARTER, JR., President of the United States, et al., Defendants.	

AFFIDAVIT

Comes now affiant, and first being duly sworn, states upon his oath that the matters contained herein are true and correct to the best of his knowledge and belief, as follows to wit:

1. I am Commander John G. Colgan, USN, presently functioning as Special Assistant to the Chief of Naval Personnel (Code, Pers-Og) for Prisoner of War/Missing in Action (hereinafter abbreviated POW/MIA) matters. Pers-Og was established on October 8, 1970. The Special Assistant for POW/MIA matters reports directly to the Chief of Naval Personnel. The mission of the office is to advise and assist the Chief of Naval Personnel in all matters under his cognizance concerning POW and MIA's. The specific functions are:

(1) Advises the Director of the Personnel Affairs Division concerning combat status determinations under the Missing Persons Act and other matters involving POW/MIA personnel and their families.

(2) Originates periodic newsletters for POW/MIA families.

(3) Coordinates repatriation operations.

(4) Acts as the Navy's primary contact point with POW/MIA next-of-kin.

(5) Maintains liaison and coordinates with other Services and Government agencies on POW/MIA matters within the functional responsibilities assigned.

2. Attachment (1) is authority delegated to Pers-Og by the Secretary of the Navy to make deposits to the Savings Deposit Program from the pay and allowances of certain members of the naval service and to authorize a withdrawal of deposits.

3. Attachment (2) is the letter appointing me as Hearing Officer for all cases requiring a hearing in accordance with Department of the Navy Regulations for Holding Hearings whenever a Status Change is considered pursuant to the Missing Persons Act (37 U.S.C. § 551, et seq.). Attachment (3) is a copy of the Navy Regulations for Holding Hearings whenever a Status Change is Considered Pursuant to the Payment to Missing Persons Act (37 U.S.C. § 551, et seq.). Attachment (4) is the Hearing Officers guide used during the hearing. The hearing rights, as a result of McDonald v. McLucas, Civ. No. 73 Civ 3190 (S.D. N.Y. Feb 14, 1974), is to be offered each next-of-kin of each missing service member currently receiving governmental financial benefits which could be terminated by a status review. They will be notified whenever the status of the members will be reviewed and a status change is being actively considered. However a Department of Defense (DOD) policy decision also granted hearing rights to the Primary next-of-kin who are not receiving governmental financial benefits from the POW/MIA's pay account. The policy decision primarily favors parents of a single service member, who are not receiving any of his earnings, by extending hearing rights to them. The hearing is conducted using the information contained in the casualty file compiled on the missing service member. Included in the file are:

(a) The Commanding Officers (CO) report of the loss and his decision as to what status the missing service member should be carried in (e.g. KIA, POW or MIA). This CO's report also contains the statement of eyewitnesses and others who had knowledge of the circumstances concerning the loss.

(b) Intelligence information gathered by intelligence agencies of the U.S. Government that correlate or may correlate to the loss of the service member.

(c) Information gathered through negotiation efforts by the U.S. Government that apply to the missing service member.

(d) Information held by the Joint Casualty Resolution Center (JCRC) that pertains to possible recovery efforts of remains of the missing service member.

(e) Any other information that the Department of the Navy receives that might pertain to the loss of the individual.

4. Large amounts of the information originally received by the U.S. Government was in classified form, however, in the last two years the U.S. Navy has declassified 187 POW/MIA case files. The only classified information contained in the files today is information that cannot be declassified because sensitive source or collection methods are involved. In such cases the original document contains all information relating to the service members casualty, without revealing the source or collection method. The next-of-kin and attorney have the right to review all the information in the file and add anything they consider relevant. It is required of the Hearing Officer to endeavor to answer all questions concerning the information which he has compiled for submission to the review board. He should not, however, comment on the weight or the sufficiency of any information, either presented by the Government or the next-of-kin. Comments of this type made by the next-of-kin or their attorney, however, are considered relevant and should be submitted to the review board. The Hearing Officer asks the next-of-kin or their attorney to put their comments in writing

for submission, or if this is not possible, the Hearing Officer will include these comments in his own report.

Printed information submitted by the next-of-kin will be labelled and made a tab of the hearing report.

The Hearing Officer will use his discretion to determine whether to ask other persons to participate in the hearing. He will do so when they are readily available and when he believes they will contribute noncumulative information to the status review board's determination.

Upon completion of the hearing the Hearing Officer compiles the information submitted by both the Government and the next-of-kin, including any comments which the next-of-kin wished to have forwarded to the review board. This information is forwarded for the board's consideration along with any recommendation which the Hearing Officer has concerning a change in status. The Navy review board is composed of three combat experienced Naval officers who individually review the case and decide if the status should be changed to a Presumptive Finding of Death (PFOD) or continued POW or MIA. The case is then sent from the Chief of Naval Personnel to the Office of the Secretary of the Navy for his approval or disapproval prior to making the change in status. All information considered by the Review Board including that submitted by next-of-kin at the hearing or in lieu of a hearing is submitted to the Secretary's designee. Appellate procedures available to the next-of-kin are in accordance with 10 U.S.C. § 1552.

Attachment (5) shows the number of Naval personnel carried POW/MIA on January 27, 1973, the day of the signing of the Paris Peace Accords. The attachment also shows Navy status changes made to the present time.

FURTHER, affiant sayeth not.

Subscribed and sworn to before
me this 15th day of Sep, 1977.

Notary Public
My commission expires [illegible]

JOHN G. COLGAN
Commander, USN

A-145

ATTACHMENT (1) TO COLGAN AFFIDAVIT - AUTHORITY DELEGATED TO PERS-OG BY SECRETARY OF THE NAVY

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20350

8 January 1971

From: Secretary of the Navy
To: Chief of Naval Personnel

Subj: Delegation of authority to make deposits to the Savings Deposit Programs from the pay and allowances of certain members of the naval service and to authorize a withdrawal of deposits

Ref: (a) Public Law 89-538, dated 14 August 1966, amending 10 USC 1035
(b) Public Law 90-122, dated 3 November 1967, amending 10 USC 1035
(c) SecNav ltr to CNP dated 20 November 1967

1. Reference (a) provided for the establishment of a savings deposit program for members of the armed forces on a "permanent duty assignment" outside the United States or its possessions.

2. Pursuant to the authority contained in reference (b), subsection (e) of section 1035 of title 10, United States Code, I hereby delegate authority to the Chief of Naval Personnel (Pers Og) in the interest of naval personnel who are in a missing status (as defined in §551(2) of title 37, United States Code) or their dependents, to initiate, stop, modify, and change allotments for deposit of unpaid pay and allowances accruing in a missing member's pay account, and to authorize withdrawal of deposits made even though the service member had an opportunity to make such savings deposits but had elected not to do so.

3. The Chief of Naval Personnel shall appoint a board of three officers to consider appeals from any denial by my designee of a request for withdrawal of deposits. The board shall submit its findings and recommendations to me for final decision.

4. Reference (c) which delegated authority to act in these cases is hereby cancelled.

John H Chafee
John H. Chafee
Secretary of the Navy

Attachment (1)

ATTACHMENT (2) TO COLGAN AFFIDAVIT - LETTER APPOINTING COLGAN HEARING OFFICER

DEPARTMENT OF DEFENSE
UNITED STATES OF AMERICA

DEPARTMENT OF THE NAVY
BUREAU OF NAVAL PERSONNEL
WASHINGTON, D.C. 20370

IN REPLY REFER TO
Pers-Og-emg
13 March 1975

From: Captain A. C. Marshall, USN, Director, Personal Services Division
To: Commander John G. Colgan, USN, 161-24-1239

Subj: Hearings in connection with Missing Persons Act status changes

Ref: (a) Department of the Navy Regulations for Holding Hearings Whenever a Status Change is Considered Pursuant to the Payment to Missing Persons Act (37 U.S.C. 551, et seq.)

1. You are hereby appointed as Hearing Officer for all cases requiring a hearing in accordance with reference (a).

A C Marshall

A. C. MARSHALL
Captain, U. S. Navy
SECNAV Designee for Administration
of the Missing Persons Act

Attachment (2)

ATTACHMENT (3) TO COLGAN AFFIDAVIT - NAVY REGULATIONS FOR HOLDING HEARINGS

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20350

Department of the Navy Regulations for Holding Hearings Whenever a Status Change is Considered Pursuant to the Payment to Missing Persons Act (37 U.S.C. §§ 551, et seq.)

1. Background. Pursuant to sections 555, 556, title 37, United States Code, the Secretary of the Navy or his designee is required, or may elect, to review the cases of those service members who have been carried in a missing status. In the case of McDonald v. McLucas, Civil No. 73 Civ. 3190 (S.D. N.Y. Feb. 14, 1974), a Federal court ordered a hearing and certain constitutional due-process safeguards as a prerequisite to any status changes. This directive implements the court decision.

2. Status Review. The review of the status of a service member of either the Navy or the Marine Corps will be conducted in the following manner:

(a) Each next-of-kin of each missing service member currently receiving governmental financial benefits which could be terminated by a status review will be notified whenever the status of the member will be reviewed and a status change is being actively considered.

(b) The next-of-kin entitled to notice of the status review will be notified of their right to attend a review hearing prior to the status review. Notification of the pending review, and of the right to attend a hearing prior to that review, will be made to the next-of-kin entitled to notice via certified mail, return receipt requested. The next-of-kin notified will be afforded 21 days from receipt of notification in which to respond whether they wish to elect any of the rights afforded. If, after 21 days, no response has been received, it will be presumed that the next-of-kin have elected not to exercise the rights afforded. If, however, the return receipt indicates that the next-of-kin never actually received notification, a reasonable attempt shall be made by letter or by other means to notify the next-of-kin, and the 21-day period shall begin only upon actual notification or when reasonable attempts to locate the next of kin have been terminated.

(c) Notification to the next-of-kin will indicate a scheduled date for the hearing, not earlier than 21 days after receipt of such notification, unless next-of-kin specifically agree to an earlier date. If the next-of-kin indicate this date is inconvenient, then the hearing may be rescheduled for a date within 10 days of the original scheduled date which is satisfactory to both the Navy or the Marine Corps and the next-of-kin. Upon written request by the notified next-of-kin, a reasonable delay in the hearing may be granted when it can be demonstrated that such delay would be meaningful to the status review or that such a delay would be essential in affording the next-of-kin the opportunity to exercise their rights. A request for delay must be in writing and it must be made to the office making the notification.

(d) The next-of-kin may attend the hearing with privately retained counsel if they choose.

(e) The next-of-kin entitled to notice will be afforded reasonable access to all information upon which the status review will be based. This information shall be compiled in a file which will be available for inspection by the next-of-kin, and counsel, at the appropriate Service Headquarters, Navy Department, Washington, D. C., during normal working hours on days prior to the scheduled hearing. Upon request, it may be reproduced and forwarded to next-of-kin upon payment of standard fees for this service.

(f) The next-of-kin entitled to notice will be afforded the opportunity before and during the hearing to present information which they consider relevant to the status review proceedings.

(g) The next-of-kin entitled to notice may exercise any or all of the rights afforded them. For example, the next-of-kin may waive their right to attend the review hearing alone, or by counsel, and still submit written information considered relevant to the status review proceedings prior to the scheduled hearing date.

(h) Hearings will be conducted at the offices of the appropriate Service Headquarters, Navy Department Washington, D.C. Costs incurred by the next-of-kin are not reimbursable by the Government.

(i) Hearings shall be conducted by a single hearing officer, appointed for that purpose.

(j) Comments or objections by the next-of-kin or their counsel to the information before the hearing officer, or to the hearing proceedings, shall be noted by the hearing officer.

(k) The hearing shall be closed to the public and limited in attendance to only those next-of-kin and their attorneys who have been afforded and elected the right of attendance. The hearing will be nonadversarial in nature and need not be recorded verbatim. The hearing may be tape-recorded, however, at the request of the next-of-kin. The agenda will be set by the hearing officer. Strict rules of evidence will not apply.

(l) The hearing officer, after his collection of information from Government records and from the next-of-kin, will forward this material to the review board. He shall include his opinion as to whether the missing service member is alive or dead, and his recommendation whether or not a status change should be made.

(m) Next-of-kin entitled to notice will be furnished, a brief statement of the facts upon which a status change was based.

(n) Next-of-kin entitled to notice who elect to waive any or all of their rights in connection with a hearing, but who prior to the hearing, decide to exercise any or all of them, shall be afforded the opportunity to exercise those rights.

26 March 1974

Approved J William Middendorf II

J. William Middendorf II
Acting Secretary of the Navy

ATTACHMENT (4) TO COLGAN AFFIDAVIT - HEARING OFFICERS GUIDE

Purpose: This Guide is to assist the officer appointed to conduct a hearing held preliminary to a change in status of a member of the Armed Forces under the Payment to Missing Persons Act, Title 37, United States Code, sections 551 *et seq*. This Guide is to supplement regulations promulgated by the Secretary of the Navy on March 26, 1974, which are found attached hereto.

I. Opening the hearing.

A. The Hearing Officer shall call the hearing to order.

HO THIS HEARING SHALL COME TO ORDER. THE HEARING WAS CALLED TO ORDER BY MYSELF, Cdr John G Colgan, UNITED STATES NAVY, AT ________ (time) ON ______________, 19 75 (date), AT THE OFFICE OF THE BUREAU OF NAVAL PERSONNEL, DEPARTMENT OF THE NAVY, WASHINGTON, D.C. THE FOLLOWING PERSONS ARE PRESENT AT THIS TIME, ____________________________ (list the persons present).

1400

Comment

In his report to the status review board, the Hearing Officer should include in written form the above nformation.

Purpose

THIS HEARING IS BEING HELD TO COLLECT INFORMATION WHICH MAY HAVE A BEARING ON THE CURRENT MISSING-IN-ACTION STATUS OF

__

UNITED STATES NAVY. INFORMATION COLLECTED BY THE HEARING OFFICER, ALONG WITH INFORMATION WHICH IS PRESENTED AT OR PRIOR TO THIS HEARING BY PERSONS NOW PRESENT, WILL BE COMPILED BY MYSELF AND SUBMITTED TO THE STATUS REVIEW BOARD. THE BOARD WILL USE THIS INFORMATION TO DETERMINE WHETHER A CHANGE IN THE OFFICIAL STATUS OF ______________________________ IS WARRANTED AT THIS TIME, THAT IS, WHETHER HE CAN REASONABLY BE PRESUMED TO BE LIVING. PERSONS PRESENT AT THIS HEARING MAY SUBMIT ANY INFORMATION WHICH THEY CONSIDER RELEVANT TO THIS MATTER. ANY COMMENTS WHICH PERSONS PRESENT AT THIS HEARING ~~MAKE~~ CONCERNING THE INFORMATION WHICH IS BEING COMPILED BY MYSELF WILL BE FORWARDED ALONG WITH THAT INFORMATION TO THE STATUS REVIEW BOARD.

TURN

Comment

The Hearing Officer should bear in mind that the purpose of the hearing includes the next-of-kin's right to present any information which the next-of-kin considers relevant to the status review proceedings. This does not preclude the Hearing Officer, in his discretion, from insisting that the information and comments submitted by the next-of-kin be noncumulative, and limited to the question of whether a status change is now warranted.

C-2

Rights

"I WOULD NOW LIKE TO REMIND YOU OF THOSE RIGHTS WHICH YOU MAY EXERCISE DURING THIS HEARING. YOU MAY HAVE A LEGAL REPRESENTATIVE, PRESENT DURING THE HEARING IF YOU SO WISH. YOU MAY ALSO VIEW THE INFORMATION WHICH WILL BE FORWARDED TO THE STATUS REVIEW BOARD FOR ITS CONSIDERATION. YOU MAY ALSO, IF YOU WISH, SUBMIT ADDITIONAL INFORMATION RELEVANT TO A POSSIBLE CHANGE IN STATUS TO THE STATUS REVIEW BOARD FOR ITS CONSIDERATION. ANY COMMENTS WHICH YOU MAY MAKE WILL BE RECORDED AND BE FORWARDED TO THE REVIEW BOARD, ALONG WITH ALL THE INFORMATION COMPILED TODAY.

Comment

The Hearing Officer should bring with him to the hearing the file of information which he has compiled which, along with the information and comments supplied by the next-of-kin or their attorney, will be forwarded to the status review board. This file should be available for inspection by the next-of-kin and their attorney during the hearing.

II. Conducting the hearing.

A. The Hearing Officer should indicate how the hearing will proceed.

BEST COPY AVAILABLE

the [illegible] Officer

HO I WOULD LIKE TO BEGIN BY READING A BRIEF SUMMARY OF THE EVENTS WHICH LEAD TO ______________________ BEING PLACED IN A MISSING-IN-ACTION STATUS, AND WHICH ALSO BEAR UPON A POSSIBLE CHANGE IN THAT STATUS AT THIS TIME. THIS SUMMARY IS EXTRACTED FROM THE INFORMATION CONTAINED IN THE FOLDER WHICH WILL BE FORWARDED TO THE REVIEW BOARD. IF YOU HAVE A QUESTION, PLEASE FEELFREE TO STOP ME AT ANY TIME. I WILL THEN RECEIVE ANY INFORMATION WHICH YOU WOULD ALSO LIKE SUBMITTED TO THE REVIEW BOARD.

Comment

The Hearing Officer should endeavor to answer all questions concerning the information which he has complied for submission to the review board. He should not, however, comment on the weight or the sufficiency of any information, either presented by the Government or the next-of-kin. Comments of this type made by the next-of-kin or their attorney, however, are considered relevant and should be submitted to the review board. The Hearing Officer should ask the next-of-kin or their attorney to put their comments in writing for submission, or if this is not possible, the Hearing Officer should include those comments in his own report.

When the Hearing Officer receives printed information submitted by the next-of-kin, he should briefly state for the record what the information is, and label it. For example: "I have received a letter dated 1 January 1974, which I will label tab A." Or "I have received a written

statement from Mrs. ______________________________,
which I will label tab b."

The Hearing Officer should use his discretion to determine whether to ask other persons to participate in the hearing. He should do so when they are readily available and the Hearing Officer believes they can supply noncumulative information which will contribute to the status review board's determination. The next-of-kin have no right to demand the Government call others to supply information. The next-of-kin may, however, arrange at their own expense for the presence of persons who they feel can supply additional information relevant to the status review proceedings.

The Hearing Officer should also use his discretion to determine whether the hearing should be recessed or postponed after it has been called to order. He may do so if he believes that a delay would be meaningful to the status review or essential in affording the next-of-kin the opportunity to exercise their rights. Determining the length of any delay is also within the discretion of the hearing officer.

III. Closing the hearing.

HO THE HEARING IS ADJOURNED AT ______________
(time).

Comment

After closing the hearing, the Hearing Officer should compile the information submitted by both the Government and the next-of-kin, including any comments which the next-of-kin wished to have forwarded to the review board.

This information should be forwarded for the board's consideration along will any recommendation which the Hearing Officer has concerning a change in status.

ATTACHMENT (5) TO COLGAN AFFIDAVIT - STATISTICS

Paris Peace Accord signed January 27, 1973

311	Navy Personnel carried POW/MIA	
138	POW's returned to the U.S. early 1973	
173		
9	POW's died while in captivity and their bodies were returned	
164	Total unaccounted for	164
5	Statuses were changed as a result of returned POW debriefs	
16	Overwater losses were changed to PFOD using 25 miles from any land as a criterion.	
1	Chronological review took place prior to McDonald v. McLucas	
22	Total	22
	Cases remaining	142
	3 POW/MIA bodies returned resulted in determination of death	3
		139
69	Presumptive Findings of Death have resulted from reviews conducted as requested by the next-of-kin	69
		70

Seventy cases remain to be resolved.

AFFIDAVIT OF CAPTAIN RAYMOND A. VOHDEN, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION

IN THE UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NEW YORK

EARL P. HOPPER, JR., by his father
and next friend, EARL P. HOPPER, SR.;

Plaintiffs,

Civil No. 77-1793

v.

JAMES E. CARTER, JR., President
of the United States, et al.,

Defendants.

AFFIDAVIT OF
CAPTAIN RAYMOND A. VOHDEN
UNITED STATES NAVY
PRINCIPAL ADVISOR TO THE DEPUTY ASSISTANT SECRETARY,
INTERNATIONAL ECONOMIC AFFAIRS AND PW/MIA AFFAIRS
DEPARTMENT OF DEFENSE

COUNTY OF ARLINGTON)
STATE OF VIRGINIA) SS:

I, Raymond A. Vohden, being duly sworn, deposes and says:

I am the Principal Advisor to the Deputy Assistant Secretary, International Economic Affairs and PW/MIA Affairs, Department of Defense.

A member of the armed services who is carried as missing in action continues to be entitled to full pay and allowances under 37 U.S.C. 552 in the same manner as other personnel of equal rank and service.

In the event the Service Secretary receives evidence of death pursuant to 37 U.S.C. 556, pay and allowances terminate on the date the Secretary receives such evidence. All pay and allowances paid up to that time are considered proper payments under 37 U.S.C. 552 even though the actual death occurred at a time prior to the date the Secretary receives such evidence of death.

In the event the Service Secretary makes a finding of death pursuant to 37 U.S.C. 555, pay and allowances paid prior to such finding are considered proper payments under 37 U.S.C. 552.

In the event the Service Secretary makes a finding of death or issues a report of death and the member is later determined to be alive and is ultimately returned to military control, the member's pay and allowances would immediately be restored to the member retroactively to the date such pay and allowances first were terminated under 37 U.S.C. 555 or 556. This is so because the status change having been erroneous, the member's entitlement to pay and allowance under Title 37, United States Code, never ceased and the record is corrected to so indicate. In such event the member's pay and allowances and all entitlements would be exactly the same as if the member never was in a missing status. The Secretary, under the provisions of 37 U.S.C. 556, may waive the recovery of an erroneous payment (e.g. death gratuity) to a dependent if he considers recovery is against equity and good conscience. No irreparable harm would be done to the member or his pay and allowances since the member would receive exactly what he would have received for the same period of time whether or not the member was in a missing status. During the Vietnam War there were nine cases where men were declared killed whom we later learned were alive. In all cases, pay and allowances were retroactively recalculated to include interest that would have been earned from the date they were declared dead. They were also given promotions they would have made in the interim.

The pay and allowances of a serviceman classified as missing in action are credited to his account and are disbursed to his dependents or other persons in accordance with the written directions provided by the serviceman on his Emergency Data Form. Under the provisions of 37 U.S.C. 553, the

Secretary may, with or without the consent, and subject to termination of the member, initiate, discontinue, increase or decrease allotments from the pay of a missing serviceman when he considers it essential for the well being and protection of the member's dependents. When a finding of death is made or a report of death issued, pay and allowances cease. Survivor benefits due to next of kin are then initiated and paid.

I declare under penalty of perjury that the foregoing is true and correct.

Raymond A. Vohden
RAYMOND A. VOHDEN

State of Virginia
County of Arlington

Subscribed and sworn to before me this 16th September 1977

Margo A. Elliott

my Commission expires: 15 February 1981

AFFIDAVIT OF JOAN VINSON, FOR DEFENDANTS, IN SUPPORT OF CROSS-MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

EARL P. HOPPER, JR., by his father and next friend, EARL P. HOPPER, SR., et al.,

Plaintiffs,

v.

JAMES E. CARTER, President of the United States, et al.

Defendants.

Civil No. 77-1793

AFFIDAVIT OF JOAN VINSON

I, Joan Vinson, of 2607 Childs Lane, Alexandria, Virginia, being duly sworn, hereby depose and say:

My husband, Colonel Bobby G. Vinson, a pilot in the United States Air Force, was shot down over North Vietnam in 1968 and was listed as missing-in-action from that time until 12 September 1977. Following this event, I along with other wives and family members in similar circumstances who were deeply concerned over the plight of the prisoners and the missing began actively discussing ways in which we might be able to help them. This ultimately led to the formation of the National League of Families of American Prisoners and Missing in Southeast Asia.

I was the first elected full-term president of the League and the first wife to meet with the North Vietnamese in Paris. I also met with representatives of the Peoples Republic of China in Budapest. All of these and similar activities of myself and others were undertaken in an effort to assist our loved ones who were listed as prisoners and missing-in-action. In particular, we attempted to bring as much pressure to bear as possible on the North Vietnamese to abide by the Geneva Convention by giving our men in captivity humane treatment, and making a proper accounting for our men killed or captured by their forces. In its efforts, the League received much public support particularly since at the time its goals were well-recognized and because it was then an organization of volunteers of those deeply interested in the welfare of the captured or missing in Southeast Asia.

Extensive debriefings of our men returned from captivity after the conclusion of the war, the results of repeated inquiries to the North Vietnamese and the other evidence available all pointed to the conclusion that Americans were no longer being held in captivity. At that time I wrote President Ford a letter which I have attached hereto for submission with this affidavit. The letter expressed my views on the subject and I personally know many wives that felt the same way.

I have continued to hold these views and believe that it is very regretable that I and others have had to wait so long for final determinations. Aside from the psychological aspects, we have experienced many personal difficulties because these determinations have not been made such as inability to sell real property, remarry, and in numerous other ways. I am grateful that action has at last been taken in my case.

FURTHER AFFIANT SAYETH NOT

Joan Vinson
JOAN VINSON

Sworn to before me this 16th day of Septemer 1977.

NOTARY PUBLIC

My Commission Expires Feb. 14, 1980

EXHIBIT TO VINSON AFFIDAVIT - LETTER FROM JOAN VINSON TO THE PRESIDENT DATED OCTOBER 24, 1974

2607 Childs Lane
Alexandria, Virginia, 22308
October 24, 1974

The President
The White House
Washington, D. C., 20500

Dear Mr. President:

I am aware that since assuming office you have been faced with an endless number of difficult problems. However, conscience requires that I bring to your attention another decision that needs to be made, the determination of change of status of all "Missing in Action" personnel in the Southeast Asian conflict.

My husband, Colonel Bobby G. Vinson, was shot down over North Vietnam in 1968. Since then, he has been listed as "Missing in Action". The empirical knowledge is that he is dead. Our children, his family, and I accept this.

I am aware that I have the prerogative to ask that his status be changed to "Killed in Action". This is a psychologically unsound act for a wife or parent to have to make. My husband, a career military officer, would feel that his service was avoiding its responsibility by placing this burden on his family. Clearly, it is the duty of the United States Government to make such a determination.

I am aware that a "Hold" has been put on the Department of Defense and its military services as a result of an appeal to the courts by a few MIA families. However, action should be taken to resolve this matter.

Please be assured that my family and I are most grateful to the United States Air Force for the services and benefits given to us during these difficult years. However, I am convinced that it is no longer fair or economically sound for the Government to continue the payment of all pay and allowances to MIA families. Perhaps, the monies saved could be better used in Veterans' benefits.

Personally, I am embarassed to continue to receive the full benefits. I feel that my husband's acts of bravery, honor, and duty to country are diminished by the Government submitting to the pressures of a limited number of MIA families.

I hope you will act soon to end this limbo situation. Be assured that you have my deepest appreciation for your thoughtful attention to this matter.

Respectfully,

Joan Vinson

Mrs. Joan Vinson (Bobby G.)

cc: The Honorable James R. Schlesinger & General George S. Brown

A-163 - A-250

THESE PAGES LEFT BLANK

AFFIDAVIT OF DERMOT G. FOLEY, ESQ., FOR PLAINTIFFS, IN OPPOSITION TO CROSS-MOTION AND IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------------------------------------X

EARL P. HOPPER, JR., et al., : Index No. 77 Civ. 1793 (JBW)

Plaintiffs, :

:

-against- **AFFIDAVIT**

:

JAMES E. CARTER, JR., et al., :

Defendants. :

---------------------------------------X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DERMOT G. FOLEY, being duly sworn, deposes and says:

1. I am counsel for the plaintiffs in this action. I submit this Affidavit in Opposition to the Cross-Motion of the defendants for dismissal of this action and further in support of the plaintiffs' Motion for a Preliminary Injunction. Specifically, the purpose of this Affidavit is to demonstrate to the Court the need for discovery in certain specific areas so that a grave miscarriage of justice can be avoided.

2. The defendants in this action have vastly superior access and control over relevant information than do the plaintiffs. While the plaintiffs know the basics of the wrongs to which they address themselves in the Complaint, the evidence which would be helpful in establishing the details of those wrongs is overwhelmingly in the control of the defendants.

3. As counsel for the plaintiffs, and as an attorney who has been involved for several years in POW/MIA matters and in determination of death difficulties particularly, I have had occasion to acquaint myself with a significant amount of material in this area. Consequently, it is my belief and conviction that during the trial on the preliminary injunction issue, the witnesses from governmental agencies were less than candid in their testimony. In fact, that testimony was so affected by careful sentence structure and innocent-appearing qualifications and limitations on what was said that the omissions appear to make the affirmative testimony misleading. Furthermore, significant areas of this testimony is in substantial conflict with my understanding of the facts.

4. To correct the clear disparity between the parties with respect to the control of and access to relevant information and evidence, it is necessary to conduct discovery which I am absolutely convinced will substantially alter the record. Periodically throughout the trial, there were references made to Dr. Roger Shields. Mr. Sieverts testified to Dr. Shields' expertise and indicated that until very recently, he played a crucial and pivotal part in the handling of POW/MIA affairs within the Department of Defense. Furthermore, despite Mr. Sieverts' acquaintance with POW/MIA matters, he testified that he advised the Chairman of the Woodcock Commission of the need and desirability to use the knowledge of Dr. Shields. I know that even after Dr. Shields left the Department of Defense and went to the Department of the Treasury, he remained until very very recently as a consultant to the Department of Defense on POW/MIA matters.

5. I have reason to believe that Dr. Shields could be the source of significant relevant information and could lead to other important relevant information which would be of assistant in resolution of the issues in this action. I personally believe that this man's testimony is indispensable and that without it, the plaintiffs will be placed at a severe and a grossly unfair disadvantage.

6. Among the areas of inquiry as to which I understand that Dr. Shields could give relevant information or information which would lead to relevant information are the following:

(a) Notwithstanding Mr. Sieverts' testimony, the Department of Defense is in possession of an abundance of evidence that the Vietnamese have been untruthful when they claimed no knowledge of American prisoners.

(b) Mr. Sieverts' testimony that there are "no grounds for doubting" the Vietnamese disclaimer of knowledge of American prisoners is simply untrue. There are circumstances about the Guggleman case which make that case relevant. The distinction between civilian and military cases is absolutely invalid. There are a number of relevant military cases which also should be discussed in this record.

(c) The contents of the War Crimes Museum in Hanoi are known in the Department of Defense and they show a great deal of the extent of Vietnamese knowledge about missing and captured Americans which belongs in this record.

(d) The Department of Defense Hawaii Briefing to the Woodcock Commission, in the version submitted to the Court, is partial and incomplete and devoid of significant and persuasive supporting evidence, particularly with respect to the extensive number of missing men as to whom an accounting is attainable.

(e) The Department of Defense has materials on the work and the conclusions of the Woodcock Commission which are relevant to this case and should be brought into this record.

(f) The Department of Defense has significant materials on the defects in both the record and the report of the Montgomery Committee, which has been submitted to this Court by the defendants and which should be looked at in far greater depth.

(g) Captain Vohden's testimony indicating a Defense Department policy of repaying salary plus 10% interest, plus other benefits to any subject of a determination of death who later returns alive is inaccurate. Furthermore, the commitment of the Secretary of Defense to which he refers is not only illegal but also unenforceable and nonbinding.

(h) The Department of Defense has information which will show how many of the good cases in the first and second categories of the Hawaii Briefing were last known to have been alive and how many of those were subsequently declared dead without evidence. Defense also knows, in each case, why these determinations occurred in such cases.

(i) The Defense Department knows that under present circumstances, respecting the ability of the Vietnamese to account and their developing disposition to do so, determinations of death at this time are not only patently arbitrary and capricious but also unwarranted and ill-advised.

(j) The Department of Defense knows that determinations of death at this time have an identifiable adverse effect on the chances of survival of any subject MIA who may now be alive in Vietnam.

(k) The Defense Department knows and can show that Mr. Sieverts knew that his testimony indicating that no POW/MIA data was left in Hanoi by the Woodcock Commission was untrue.

(l) The Defense Department knows that the United States is receiving evidence respecting POW/MIA's now from Southeast Asia -- especially Laos -- and this record should show the extent and nature of that evidence and should demonstrate what actions are being taken on the basis of it.

(m) The Defense Department knows that there is a conscious reduction in the level of U. S. effort in the POW/MIA accounting area contemporaneously with the planned closing of all remaining cases by the determinations of death.

(n) The Defense Department has evidence showing that specific efforts by the United States to get an accounting for specific individuals decline after determinations of death.

(o) The Defense Department has long known and recognized that continuance of missing or captured status is the best protection possible for the missing men and that once they are declared dead, the impetus effectively goes out of the effort to get an accounting for them. Apart from inclusion upon generalized listings, the Defense Department knows that specific inquiries with respect to specific individuals declined after those individuals have become the subjects of the determinations of death.

(p) The Defense Department knows and can substantiate the elements of irreparable injury that flow to the subject MIA's from determinations of death.

(q) The Defense Department knows that it is not being completely candid when it makes claims as to the effectiveness of the communication system in POW camps with respect to identifying the prisoners there. While this system did succeed in putting certain prisoners into communication with one another and did result in some identifications being made among prisoners, it did not have any affect on some others and it cannot be said to have established who all of the captured Americans were.

(r) The Defense Department knows that the "policies" and "directives" of the Defense Department and/or various branches of the Armed Forces, which were alluded to by witnesses during the trial, do not have the binding force of service regulations, have no permanence and are not the product of any legitimate enforceable rule-making procedures. Furthermore, to a significant degree, we expect to prove that these were cosmetic creations designed for use in this lawsuit but not thought out or designed for effective or long-range implementation.

7. Due to the absence of access to information such as this, the plaintiffs are placed at an unconscionable disadvantage in this proceeding. To conclude the matter without remedying this deficiency would effectively deprive the plaintiffs of an opportunity to fairly present their case. I firmly believe that the best and most expeditious approach to obtaining this testimony is to require the production of the documents which were subpoenaed but not produced in the trial and to depose Dr. Shields who, because he is located too far from this Court, could not be subpoenaed to the trial. In particular, Dr. Shields is indispensable and irreplaceable. There simply is no one with his command of this situation. Indeed, I have been informed that during the course of the trial, individuals on both sides were busy trying to contact Dr. Shields so as to get the facts straight for presentation to the Court.

8. Because of this, I believe the Court should at least wonder about the significance of the fact that the government, whose employee Dr. Shields still is, not only failed to produce him on plaintiffs' subpoena but failed to produce him on their own account. On numerous occasions in the past, the testimony of Dr. Shields has been used both in court and before legislative committees. It is legitimate to ask why he is being kept away now. I submit that it is because he is dangerous to the government's case.

9. In addition to Dr. Shields, discovery would be helpful from two other sources. References were made during the trial to a status review respecting Douglas Martin. His wife, who is an attorney, is expected to testify before the trial is over. The Douglas Martin case is the only instance I know of since the Paris Agreement where an attempt by the government to obtain a determination of death was successfully resisted. In that defense, a major portion of the legal work was done by a Florida attorney named Gavin Letts. In the course of litigating that matter, Gavin Letts became interested in and incensed by the overpowering unfairness of status review proceedings.* I asked him to testify during this trial on the subject. He was unable to do so because he has become a Judge on the Florida State Court of Appeals and has told me that he considers it inappropriate to testify except under subpoena. Since, due to his distance from this Court, he could not be subpoenaed for this trial, I can only hope to get his testimony in the future on a deposition. That discovery should be obtained.

10. The defendants in this action are submitting copies of the record and "final report" of the Montgomery Committee. Plaintiffs position with respect to the defects and inadequacies of that record and report is set forth in the complaint. In addition, I attach hereto as Exhibit B a copy of a rebuttal to the Montgomery Report, which was issued by the National League of Families of American Prisoners Missing in Southeast Asia. That rebuttal helps

---

*I attach hereto, as Exhibit A the transcript of an article on the subject written by Gavin Letts.

indicate areas of objection, but it does not really explain the matter in the way that effective discovery could. In particular, the plaintiffs maintained that the Montgomery Report has no official standing whatever for several reasons including the fact that the Montgomery Committee was split five-to-five on the approval of the Report, and, hence, it did not have required majority support. This and many other problems relevant to the Montgomery Committee and the Montgomery Report should be explored before the Record and Report are serious considered by the Court. For this, also, discovery is desired.

11. Because of the problems discussed in this Affidavit, I respectfully submit to the Court that the defendants' Cross-Motion for Dismissal, which in effect seeks summary judgment, should not even be considered until reasonable discovery has been had and the parties are placed in some degree of relative parity. Furthermore, I respectfully submit that such discovery is reasonable and necessary before the plaintiffs are deprived of injunctive relief. If, on the other hand, the Court decides to grant the injunctive relief at this point, the plaintiffs would nonetheless need to proceed with the discovery as expeditiously as possible so as to get ready for further litigation on the merits of the action.

WHEREFORE, I respectfully request that the Court deny the defendants' Cross-Motion for Dismissal, grant the plaintiffs' Motion for a Preliminary Injunction or, if it does not grant that Preliminary Injunction, continue the temporary restraining order while plaintiffs complete the discovery discussed in the above Affidavit.

/s/

DERMOT G. FOLEY

Sworn to before me this

22 day of September, 1977

Notary Public

JOHN A. K. BRADLEY
Notary Public, State of New York
No. [illegible] 6892303
Qualified in New York County
Commission Expires March 30, 1978

Extensive debriefings of our men returned from captivity after the

---

EXHIBIT A TO FOLEY AFFIDAVIT - TRANSCRIPT OF ARTICLE BY GAVIN LETTS

M.I.A. COVER UP

Unless President Ford, or Congress, intervenes, the current outlook for the M.I.A. families is depressing and, without regard to any other indicators, the future can be ominously discerned from the recent official pronouncement to the effect that no more status change hearings are contemplated until the courts rule on the present controversy which is before them for judicial determination. Such a pronouncement is ominous because it cannot be unfair to conclude that the Services will resume such hearings if the New York decision is favorable to the Government; thus it appears that the Services are being restrained solely because of the courts. This is most regrettable for, in my opinion, any restraint should rather be based upon the continuing reports of P.O.W.s alive in captivity. Pounded by questions about these sighting reports, the beleaguered Government spokesmen repeatedly point out that the reports do not constitute "hard evidence" are "unconfirmed", "second hand" or "unreliable", but it is interesting to note that such choice of wording never describes the reports as false or unbelievable and all official continued negotiations with the various southeast Asian Governments always include demands for information on Americans "held". Accordingly, in the name of common decency, one would suppose that the official attitude should be that the coffin lids of our men will not be nailed shut until every such sighting can be checked out and reasonably presumed to be false. Unfortunately, however, such is not the attitude of the Casualty Office at Randolph Air Force Base. To back up my contention, there follow my personal impressions, gained during two visits there, and several paraphrases and quotes of conversations with Casualty Office personnel. If any are considered worthy of denial then, in advance, I hereby suggest for myself, the somewhat melodramatic solution of a polygraph test.

For instance, at the conclusion of a recent status change hearing, one member of the Casualty Office remarked to me that he did, indeed, know that a few of our boys were supposedly still alive in southeast Asia, but that he believed all of those to be deserters! (Even if he's right, what are their names?)

Another officer told me that he hoped I could live with my conscience for persuading the reviewing board to continue the M.I.A. status of my client's husband. At my open mouthed astonishment, it was explained to me that it was perfectly obvious to him that my client's husband was dead and that my actions had helped condemn her to continue living in a vacuum. I would concede that he may have a point for I have, indeed, agonized over that very problem for a young and beautiful woman; yet it is obvious that the vacuum-like existence of so many families is not created by the actions of lawyers, such as Foley, (surely a most dedicated and selfless man) but by the withholding of, and by the failure to disseminate, information which should have been passed on to the families. The familiar argument for such withholdings and failures is that the officials do not wish to raise false hopes; however, any second rate psychiatrist would agree that the repeated discoveries that our Government's information is incorrect, inaccurate or deliberately withheld (said discoveries usually made by reason of diligent personal research by aggrieved families) have completely destroyed the Government's credibility. As a natural consequence, the families will not accept the official assessment that their loved ones are dead for they simply do not, and cannot, believe what they are told. How much better it would have been for the Government to have established trust by complete candor, disclosure and forthrightness and to have included with it any regretful conclusions. Any cynic would observe that many of the families would still remain unconvinced and I am sure that in certain cases this would be true; however, disagreement, vis-a-vis, outright distrust and outrage, are two entirely different things. My client, Karen Martin, did not know whether to laugh, cry, have a fit of hysterics or throw up when an officer of the U. S. Air Force, at her hearing, baldly told her that her attitude in trying to keep her husband in an M.I.A. status was unfair to the other wife involved, who happened to believe that her husband was dead. The Casualty Office's most recent newsletter unequivocally demonstrates how it feels when reporting that:

> "... there is no basis for believing
> that anyone, other than Emmett Kay,

is being held captive...."

The attributed source for this statement was knowledgeable Government Agencies, but with all due respect, that is not what the knowledgeable agencies are saying. Attached to the very same newsletter is a quote from the head of JCRC, B. G. Ulatoski, saying that:

> "...with the exception of Emmet Kay, there is no hard evidence of any U. S. P.O.W.s remaining..."

The phrase "no hard evidence" cannot by any stretch of the imagination, be synonymous with "no basis". At best, therefore, Colonel Gratch's interpretation reveals his personal conviction rather than an accurate paraphrase.

When Karen Martin first was told that her husband, Captain Douglas Martin, had been shot down in April, 1973, and that hope for him was slim, she believed it without question. After all, both she and her husband were raised as Air Force brats, loved the Air Force and believed in its integrity. Again and again, the Casualty Office told her that there was no more information about him, other then two Communist radio broadcasts declaring that two American flyers shot down, in the same time frame, were dead. (Please note that the Government frequently quotes Communist propaganda as evidence of death, but just as frequently, finds our own intelligence reports totally unreliable evidence of life). Meanwhile, Karen became involved in the M.I.A. movement and to her dismay began hearing story after story of Government deception and incompetence on the question of M.I.A. information. The tales shook her, but she simply could not accept them, as recounted, until she found out that the Government had a sighting report naming her own husband, which had not been revealed to her. How did she find out? Well, she did not find out from the Government, that's for sure, but from a private source, and that most vital report would never have been considered at her husband's status change hearing, nor would she even have known of it, but for the dogged persistance of a Tennessee policeman, Sam James (the father of the WSO on the same plane) who went personally to southeast Asia and perused a confidential file, supposedly not for his eyes. (Parenthetically, it should be noted that we were successful at the hearing on Karen's husband and the reviewing board, chaired by a Colonel Atwood, treated us most fairly and judiciously).

Any reader, may justifiably wonder if there is a particular point to be made in this article or if this is merely another M.I.A. horror story. There is a point, however, and it is this:

> WHETHER BY ORDER OR BY PERSONAL CONVICTION, THE PERSONNEL OF THE CASUALTY OFFICE AT RANDOLPH AIR FORCE BASE DO NOT BELIEVE THAT ANY OF THE M.I.A.s OR P.O.W.s UNACCOUNTED FOR (EXCEPT DESERTERS) ARE ALIVE AND THEY SEEK DECLARATION, OR FINDINGS, OF DEATH IN ALL CASES.

As a consequence, those families who wish to continue to keep their loved ones from being officially declared dead, should regard the Casualty Office as hostile, rather than friendly, and act accordingly. There follow some suggestions as to what to do if a status change hearing, in which you have an interest, is scheduled:

1. You must read through the Air Force file completely, well in advance of the hearing for there may be references therein to evidence, witnesses and exhibits which you may want the Casualty Office to produce. This may involve more than one visit to Randolph since you cannot get copies of the file to peruse at your leisure. Accordingly, you must go through the file under the watchful eyes of at least two Casualty Office personnel. This is true even if you have already read through your file, because the Casualty Office may re-type and edit your file prior to a hearing. (I have positive proof of this being done.)

2. You should politely insist that no one from the Casualty Office be permitted to sit on the reviewing board, for they are not impartial. To agree to Casualty Office personnel sitting on the board is a classic example of admitting a fox into the hen house. I do not suggest that they are villains, but they have already made up their minds or there

would have been no status change hearing called for in the first place (other than the mandatory 12 month review).

3. You should obtain an outside court reporter to transcribe the hearing, rather than depend on the Air Force edited ttanscript of the tapes.

4. You should file a written summary of your case, containing both evidence and argument, prior to the hearing.

5. You should include evidence of all sightings, even [illegible] f an unconfirmed nature, to demonstrate for the record that there are still U. S. boys over there, alive.

6. You should try to obtain affidavits or written statements from anyone who may have information tending to support the theory that your loved one was seen alive on the ground, or could have ejected successfully.

7. You must go to the hearing in person. The psychology of the families actually being there is most compelling. Secondary, next of kin, including fathers and mothers, should likewise seek permission to attend.

8. You should ask the Casualty Office to show you, in writing, where it has checked with other agencies for any information, whether classified or not, on your loved one's case, especially J.C.R.C., D.I.A. and D.O.D. If the information is classified, you must request declassification and gain a postponement until you get it.

9. Be sure you receive, and read carefully, a copy of the latest regulations governing the hearing.

10. If financially possible, the M.I.A.'s income should be preserved for him, or, used solely to meet obligations in his interest. It is sad, but there are many Government spokesmen who have suggested that it is the money, not the life, that motivates the M.I.A. wives. Undoubtedly, in some cases such is true, but it is disgusting to pin such a label on the movement as a whole. Never the less, you cannot blame reasonable men for asking themselves the question and you should take pains to convince the review board that you are not just trying to preserve a meal ticket. For instance, I know one lovely girl, fighting to keep her husband's M.I.A. status, who would receive nearly $200,000.00 in life insurance if her husband were declared dead. Such a state of affairs should, if it exists, be demonstrated.

The foregoing list is not intended to be exclusive and you must carefully evaluate your own particular case, preferably, with some outsider who can keep your perspective objective. Unfortunately, we must all bear in mind that the most optimistic reports indicate that there are probably somewhat less than 200 of these men alive. In consequence, you must go forward with life upon the assumption that the odds are at least 6 to 1 in favor of your loved one being dead. Notwithstanding, it is my firm belief that the question of whether to give up waiting, or not, involves a most intimate and personal decision which the Government has no right to dictate the answer to, as long as it has any reason to believe that there might, indeed, be an unknown number of P.O.W.s being held.

At all events, it would appear to me to be imperative that legislation should be introduced to insure that the missing personnel are personally represented at all hearings by use of a guardian ad litem, for, at present, they, officially, live or die depending on the whim of their wives, and in the case of an unhappy marriage, the M.I.A.'s chances are negligible.

It has been suggested that the real truth is that the current political situation makes it impossible to rattle sabers and insist on an accounting, that this is the real reason for the vague and evasive behavior of the Government, which is embarrassed to admit its impotence. Such appears to me to be a viable theory and if it is correct why, oh why, in God's name, not tell us so? My brief acquaintanceship with the M.I.A. movement leaves me in no doubt that everybody concerned, above all else, but seeks the truth.

Indeed, perhaps the momentous events of the last few days may at long last result in some insight into what the Government knows or suspects about the existence of P.O.W.s alive in captivity. Certainly, President Ford is the kind of man who will tell it to us like it really is. One can only hope and pray that he can find the time among his multitude of pressing problems, to at least direct his subordinates to level with the M.I.A. families, for there can be little doubt that they have yet to do so.

Gavin K. Letts

EXHIBIT B TO FOLEY AFFIDAVIT - LEAGUE ANALYSIS OF COMMITTEE REPORT

LEAGUE ANALYSIS

OF

COMMITTEE REPORT

On December 15, 1976, the House Select Committee on Missing Persons in Southeast Asia, after a 15-month "study and investigation," released their final conclusions and recommendations. This analysis of that report will look primarily at their major conclusions and recommendations, what facts, if any, they were based upon and point out aspects of the MIA issue which still need to be pursued and investigated.

Prior to looking at the committee's findings, it is important that a few points be made.

To begin, it would be useful to note the purposes for which the select committee was created. The mandate of the committee was to investigate the failure to achieve an accounting for the POWs and MIAs and the need for additional inspection teams.[1] Such matters as "status changes" had previously been assigned to another House committee and, it was clearly understood, were no part of the select committee's mandate. Also, the select committee's efforts were to focus on the obtaining of an accounting. Clearly they were not to include any unfounded speculations as to what such an accounting would eventually produce, if and when it were achieved.

From the start, it was obvious that the select committee was limited by extremely modest funds, facilities and personnel. The total budget of this committee for its 15 months of operation amounted to $350,000. This included provision for only a staff director, three professional staff assistants and two office personnel. When the committee's report was finally made public, the League was shocked to learn that about one half of the $350,000 allotted was returned to the House of Representatives.[2] Thus, the committee's "thorough and exhaustive investigation" was done for less than $200,000, about $13,000 a month. This amount scarcely covers the salaries for the staff and leaves little for an extensive, independent investigation.

As a result, it is clear that the committee engaged in virtually no independent investigation of raw or primary sources. Rather, it was essentially the recipient of data supplied by United States government agencies, all of which were suspect because they had their own performances and interests to protect. This contention is further strengthened by a January 1977 letter from then Secretary of Defense Donald Rumsfeld to Chairman G.V. (Sonny) Montgomery, which in part says, "I am pleased that the Department of Defense had the opportunity to assist the select committee in its investigation. Your continuing support of our policies and your findings will be most beneficial to the Department..." Essentially, it was a spoon-feeding operation from biased and questionable sources.

Available primary or raw materials were not comprehensively examined. For instance, under the Freedom of Information Act, we learned of millions of POW/MIA related documents in the U.S. control which never were indexed and filed as required by law. It is now understood that this collection amounts to some 3.5 million documents.[3] Assuming that each document was only one page in length and that xeroxing costs 10¢ per page, the entire budget of the committee would have been exhausted in merely photocopying these documents, without any provision for reading and analyzing them. This entire area was ignored, and necessarily so, given the modest circumstances under which the select committee functioned.

Preconceived Ideas

The week following their appointment to the committee, some members immediately began speculating in the press as to whether any of the POW/MIAs were alive. Noteably, Representative Paul McCloskey, Jr. was quoted nation-wide as saying that none of the remaining POWs or MIAs were alive, and soon thereafter he began claiming that only a small number of MIAs could ever be accounted for. These early speculations were totally without supportive evidence.

As the committee proceeded with its work, additional evidence emerged indicating an early disposition to prejudge and pave-over the MIA issue, rather than really investigate it. For example, in July of 1976 the staff director of the select committee informed a reporter from the New York Times that he was "on a collision course" with the League and the families. He also told the Washington Post that some of the families were far more interested in financial matters than gaining an accounting. He went on to accuse some families of becoming "professional MIA celebrities" and he wildly speculated on how many of the missing men might be accounted for.[4] This behavior was brought to the attention of Chairman Montgomery with a request that the staff director be disciplined or replaced.[5] That request was never acknowledged by the Chairman.

During the summer of 1976, Montgomery began approaching veterans' organizations urging their support for termination of the committee and his recommendations calling for status changes on all of the men. The Chairman also informed news reporters that he had a commitment from the "majority" of the committee to support declaring all of the men dead. This was not only printed in various newspapers, but was confirmed in discussions with reporters. To this day, we do not know which members constituted the so-called majority, as at least five of the ten members of the committee disagreed with that recommendation. In short there was no majority supporting the Chairman's views.

Members Dissent

It should be noted that events and procedures surrounding the approval of the final report have led to substantial doubts as to its validity. A meeting of the committee was called to consider the final report. The meeting was scheduled for a time during which two members, who were known dissenters, could not be present. Additionally, two more members had to leave the meeting well before the discussions were completed and before the report was agreed upon. Those who did stay for the entire session say no formal vote on the conclusions and recommendatio was ever taken. On the day following the meeting, several members of the committee tried to persuade the Chairman to reconvene the gatherin for further discussions. At that time, Congressman Ottinger wrote to the League saying, "Yesterday the select committee held its first meeting to discuss the draft report prepared by the committee staff. There was considerable difference of opinion and the issue is as yet unresolved." Chairman Montgomery refused to call another meeting and ordered the incomplete and controversial report sent to the printers.[6]

Congressmen Benjamin A. Gilman and Tennyson Guyer, disagreeing with a substantial portion of the report, prepared separate views for the record. Among their major points of disagreement were the speculative conclusion that all of the missing Americans were dead; the recommendation calling for case reviews (status changes) on all remaining POW/MIAs; and the unwarranted speculation on the number of men who could be accounted for.[7]

Congressman Joe Moakley, in additional remarks prepared for the record which were co-signed by Representative Richard Ottinger, expressed caution in concluding that all Americans in Indochina are dead, saying, "We have found no evidence to support either the contention that all the missing are dead or that they are alive... We have no evidence, as a committee, to reach any conclusion on the matter." Congressmen Moakley and Ottinger also strongly objected to the recommendation that called for status reviews, as they said the committee was neither obligated nor authorized to deal with the issue. They added it was their hope "that President Carter will act with extreme caution in this area and that any undertaking of this kind will be dealt with in the full context of the administration's diplomatic goals and the perception of possible success of direct negotiations on the question of accounting." Moakley and Ottinger also expressed more skepticism in regard to the Nixon-Kissinger "secret diplomacy" than does the committee's report.[8]

After the release of the report, the National League of Families learned that Congressman Jim Lloyd had attempted to add his name to Moakley's views, but the committee staff had already rushed the report to the printers and Lloyd's dissent was omitted from the record.[9]

THUS, FIVE COMMITTEE MEMBERS, HALF OF THE COMMITTEE, DISAGREE ENTIRELY WITH MAJOR CONCLUSIONS AND RECOMMENDATIONS OF THE REPORT.[10]

In a later attempt to stifle the views of the dissenting committee members, Montgomery refused to allow Congressmen Gilman and Guyer to accompany him, and other members of the committee, to a January 31, 1977 meeting to brief President Carter on their report. Congressman Moakley, who was also unable to attend the meeting, wrote the following letter to the President in an attempt to present a more balanced view of the committee's report:

MAJORITY MEMBERS
RAY J. MADDEN, IND., CHAIRMAN
JAMES J. DELANEY, N.Y.
RICHARD BOLLING, MO.
B. F. SISK, CALIF.
JOHN YOUNG, TEX.
CLAUDE PEPPER, FLA.
SPARK M. MATSUNAGA, HAWAII
MORGAN F. MURPHY, ILL.
GILLIS W. LONG, LA.
JOHN JOSEPH MOAKLEY, MASS.
ANDREW YOUNG, GA.

D. GREGORY NICOSIA
CHIEF COUNSEL

Ninety-Fourth Congreſs
U.S. House of Repreſentatives
Committee on Rules
Waſhington, D.C. 20515

MINORITY MEMBERS
JAMES H. QUILLEN, TENN.
RANKING MINORITY MEMBER
JOHN B. ANDERSON, ILL.
D. L. LATTA, OHIO
DEL CLAWSON, CALIF.
TRENT LOTT, MISS.

WILLIAM D. CROSBY, JR.
MINORITY COUNSEL

February 1, 1977

The President
The White House
Washington, D.C.

Dear Mr. President:

I would like to express my deep personal appreciation for the amount of time and attention you are giving to the problem of missing persons in Southeast Asia so early in your Administration. Since I was unable to join the other Members of the House Select Committee yesterday, I hoped I could send a letter to present a few thoughts on the issue.

The Committee's final report presents two findings and recommendations which go to the heart of the controversy. The Committee concluded that there are no Americans alive in Indochina and recommended that the Administration proceed with immediate status reviews.

I think it is important to note that outright dissent to both were expressed in Separate Views by two Members of the Committee and I filed Additional Views, taking a far more cautious position, which were supported by two other Members. This even split must be seen as representing the true views of the Committee.

Fate of the Missing: The Committee report stress the statistical inferences which led to the Committee's "gut reaction" in assuming that there are no Americans alive in Indochina. But the Committee has presented no additional proof. It is only a hunch. It should not have served as the basis for Committee findings and it would be most unfortunate if it were used as a basis for foreign policy and DoD status decisions.

Status Reviews: No one argues that the Department of Defense can continue to carry missing personnel in MIA or POW categories indefinitely. But we consistently encountered reactions from Vietnamese authorities which indicated their belief that real progress could be made if you were elected President. I would strongly urge that you reach your decision on status reviews only after some diplomatic contacts have been made and you have some basis for weighing the long term prospects for an accounting.

Vietnam: I would strongly urge your Administration to undertake negotiations with Vietnam at the earliest possible opportunity. I think it is important to realize that no progress can be made outside the context of diplomatic contact. But we have seen clearly the willingness of the Vietnamese to exploit our anguish over the MIA issue and our policy, I hope, will be based only on withdrawable gestures -- which would not include UN membership.

But, above all, I would urge you to reach no decision until you have discussed these issues personally with the real experts. Our Committee worked for 15 months on the MIA issue but the families have lived with the issue, in some cases, for more than a decade and I sincerely hope that they can be given the same opportunity afforded to our Committee.

Again, my sincere thank for your concern.

Sincerely,

Joe Moakley

JOHN JOSEPH MOAKLEY
Member, Select Committee on
Missing Persons in Southeast
Asia (94th Congress)

Committee Conclusion

> "That the results of the investigation and information gathered during its 15-month tenure have led this committee to the belief that no Americans are still being held alive as prisoners in Indochina, or elsewhere, as a result of the war in Indochina."

In discussing the validity of this conclusion, one first has to discuss the nature of the committee's investigation and information gathering. As pointed out earlier, the committee was operating with a tiny staff and a frugal budget, thereby eliminating the possibility of an extensive, independent staff investigation. Consequently, the committee staff relied primarily upon Department of Defense (DoD) and Department of State liaison personnel to do the "investigation." This consisted of requests for information being passed from the committee staff to the liaison personnel (both of whom maintained full time desk space in the committee staff office). The State and DoD representatives would attempt to obtain the necessary information to satisfy the committee's request from their government agency.

For example, if the committee received information from a POW/MIA fami or another "outside" source regarding a possible sighting report of American prisoners, the staff would routinely ask the DoD and State personnel to furnish their version of the subject. Sometimes the Defense Intelligence Agency (DIA) or the Central Intelligence Agency (CIA) was called directly by the staff, but primarily the information was passed through the Defense Department or State Department.[11] It i significant that most of these instances were brought to the attentio of the committee because there was reason for dissatisfaction with St and DoD past performance. Hence, resolution by these agencies was inappropriate.

On the rare occasions when the staff did their own investigation, often at the insistence of the League, they entered into it with a negative attitude. If the results of their investigation were positive, or if they were unable to discredit the information they received, the staff then attempted to discredit the person from whom the information was obtained.

An example is the staff's study of information supplied to them by General Vang Pao, a former leader of the Royal Lao Forces. General Vang Pao had reported to Congressman Gilman in December 1973 that he had information that 8 to 10 American pilots were being held by the North Vietnamese for purposes of extracting technical information. In March of 1976 a staff member, Job Dittberner, met with the General to get further information on the Americans, and the following July, Congressman McCloskey also met with Vang Pao.

Based upon the information received from Vang Pao and a CIA analysis, McCloskey, in a confidential memo dated August 3, 1976 to Chairman Montgomery, said, "My conclusion from a careful review of materials furnished by the CIA is that we cannot write-off the possibility of 8 to 11 American POWs still being held in a remote area of Laos by the North Vietnamese." He went on to add, "The CIA report confirms reports of 9 American POWs in Laos from sources unrelated to Vang Pao."[12] However, Dittberner's attitude was quite different. He discounted all of what he was told by Vang Pao by saying that the General was a "flaky, senile old man."[13]

Therefore, the committee's final report mentions General Vang Pao, but does its best to discredit his statements even though the CIA confirmed that they had received similar reports from sources unrelated to Vang Pao.[14]

The attitude of the committee staff in their "investigations" seemed to the League to be one of trying to discredit leads, instead of trying to confirm or prove them to be of sufficient substance to warrant further pursuit.

Numerous instances can be cited where the committee was given information which they did not, or were unable to, follow-up. For instance, CBS newsman, Walter Cronkite, Chairman of the Committee to Free Journalists held in Southeast Asia, testified before the committee and gave detailed information regarding some journalists in captivity in eastern Cambodia as late as December 1973.[15] This report was substantiated by Major General Robert Kingston, former commander of the Joint Casualty Resolution Center (JCRC), when he appeared before the committee. He told the group that he didn't feel there were Americans still being held prisoner, with the possible exception of non-military personnel being held in eastern Cambodia.[16]

The committee's report only briefly notes that Cronkite appeared, never bothering to explain the substance of his reports or giving any indication the committee followed-up and investigated these reports. What happened to these journalists? The committee doesn't seem to know, yet they do admit that DIA has information to "affirm the possibility that a very few Americans were prisoners (in Cambodia) in 1973."[17]

In another example, the committee virtually ignores the fact that an

American tourist, Charles Dean, was captured in Laos in September 1974 along with a young Australian, Neal Sharman. The U.S. Embassy in Vientiane made repeated representations to the Pathet Lao on behalf of the two captured men, but the Lao steadfastly denied holding them. Meanwhile, numerous confirmed sightings of the two were received and in one case passport photos were provided. This is a classic example of the Communists denying holding men, when, in fact, the U.S. knew they were alive at the time. The committee report never mentions what happened to Dean and Sharman.

Historical Investigation

The committee staff did do some historical investigation of previous wars and the return of prisoners. In the case of the Korean war, the committee admits that, "Some prisoners who had sent mail or who had been used in propaganda efforts have never been accounted for. The U.S. government tried persistently to obtain an accounting, particularly for 450 men who were believed to have been alive at one time in Communist hands."[18]

To further substantiate the precident of Communist detention of prisoners after the end of hostilities, the committee hired a consultant to report on the POW/MIA problem following the French Indochina war. The consultant testified that for many years following the end of hostilities the Vietnamese released foreign legionaires whom they claimed were "ralliers" or deserters. Two years after the end of the war, some 380 men were returned to the French command and some 450 men were repatriated to Central and Eastern European countries. During the 1960's and early 1970's, several hundred North Africans and Europeans were also repatriated. The committee consultant acknowledged there is evidence these groups of alleged "ralliers" were held by the Communists against their will.[19]

Committee 'Beliefs'

Primarily, the committee report quotes at length the testimony of persons who "don't believe" any POWs remain alive in Indochina. It appears the committee staff selected testimony and witnesses to support their personal beliefs that no one is alive. They do admit, however, that a number of men were known to have successfully exited their aircraft, and/or were seen captured by the enemy.[20] They admit these men have never been accounted for, but unless it is positively known a man entered the formal POW system and they can "confirm" he is still alive today, the committee doesn't consider the man to be a POW.

(The League has been unable to obtain a precise definition for the term "confirmed" as used by both the committee and U.S. intelligence agencies. It appears that to "confirm" a sighting of an American POW, the information must come from more than one source and the CIA must be capable of sending their own person into the area to further verify the information. In some instances, the intelligence community has admitted that several sources have provided them with identical information to indicate a man is alive, but they respond by saying "the information cannot be directly correlated to any known POW in the area at this time." Therefore, it appears that to "confirm" a sighting, the U.S. had to previously know the man was held in a certain area and know his name.)

Continually, the committee report focuses on minimal chances of survi based on time, terrain, food inadequacies, circumstances of loss, etc as reasons to support their speculation that all of the men perished. They ignore the FACT that the POW returnees did survive under the same circumstances of loss and deprivation which the committee now cites to prove that survival was impossible.

The report also says, "The only area positively identified as a permanent POW camp outside of North Vietnam was the Pathet Lao POW camp at Sam Neua."[21] Since no returned American POWs were ever held there, what happened to the men in this camp? The committee report fails to say.

It is also interesting to note that when statements from Communist officials or intelligence sources support the conclusions and recommendations of the committee, they are given high credibility. On the other hand, when intelligence information originating from a Communist source indicates that men could still be held, the committee discounts such information and pronounces it "fallacious."[22]

Thus, the report says that due to Communist statements denying they hold any remaining POWs, the failure of the committee to find positive "evidence" that anyone is alive today, and the inability of intelligence agencies to "confirm" sightings, it is believed that all POWs and MIAs are dead.[23]

In the League's opinion, the committee could have and should have been far more cautious in "writing-off" the men. Too many reports could not be discredited by the committee, too many facts prove that some of the men were alive at one time to just flatly state "all the men are dead." The truth is that, except for the Communist Governments of Indochina, NO ONE knows for certain if any men remain alive in captivity.

Committee Conclusion

> "That current legislation, principally Title 37, U.S. Code, Sections 551-556, adequately protects the rights of the missing persons and their next-of-kin."

As this section of the U.S. Code has been the subject of considerable litigation, some of which is still pending, we will not attempt to argue the points of the existing law. To do so would require volumes of briefs and substantial legal counsel. However, this conclusion, which was reached by the committee's staff, is especially curious, particularly in light of the fact that no member of the staff was trained in law or had any legal background.

One has to question the basis of this opinion especially in view of the fact that in 1974 a Federal District Court and the U.S. Supreme Court ruled the sections, as they stand, to be unconstitutional both on their face and as applied.[24] The text of the committee's report further refutes their conclusion by saying, "If the court's decision was made to protect constitutional rights of the missing serviceman, if failed to do so."[25]

In conversations with League officials, the committee staff defended their opinion saying that this law was sufficient to declare men dead at the end of World War II and Korea, and none presumed dead by this procedure had ever returned alive. What does this have to do with Vietnam? Does this mean if a man is presumed dead now, due to the lapse of time and lack of information proving he is currently alive, he will never return solely because no one returned from World War II or Korea? Maybe the law was sufficient for handling the POW/MIA cases from two previous wars, but it doesn't necessarily follow that it is adequate in the aftermath of the Vietnam war. Comparisons between World War II, Korea and Vietnam are irrelevant in this instance.

Committee Recommendation

> "That, inasmuch as the select committee requested a moratorium on case reviews during the committee's tenure, the military secretaries should immediately reinstitute individual case reviews in the manner prescribed by public law."

Of the recommendations made by the committee, none is more controversial than this. As mentioned earlier, the inclusion of this recommendation is highly suspect given the dissenting views of five of the ten committee members [illegible] such a move.

It should also be noted that although the committee did request a moratorium on case (status) reviews, it was Defense Department practice at that time not to conduct such reviews unless requested by the primary next-of-kin. This practice was first initiated by the Federal Court when it enjoined DoD from holding reviews (which resulted in status changes) while litigation was being heard. After the law suit brought by the families was heard, the court injunction ceased, but DoD did not resume case-by-case reviews.

Since the committee wasn't responsible for stopping status reviews in the first place, and has no jurisdiction over the Defense Department, the recommendation that DoD "immediately resume" case reviews is totally inappropriate.

As noted in Congressman Moakley's additional views in the report, the committee was not even authorized to take up the subject of case reviews.

Moakley, objecting strongly to the recommendation, says, "While H.Res. 335 (the resolution authorizing formation of the select committee) might be read to give the committee authority to report on this matter, I wish to state as clearly as possible my impression, as floor manager of the resolution, that it neither obliges nor even authorizes the committee to deal with the issue of status reviews. Under the rules of the House, the matter rests within the exclusive jurisdiction of the committee on Armed Services, as a legislative issue."[26]

Chairman Montgomery had originally assured the League of Families that his committee could not and would not be making recommendations on status classifications, as this wasn't within the jurisdiction of his panel.[27] However, at some point, it is apparent that Montgomery changed his mind, but never bothered to inform the League or at least one-half of the committee.

Biased Portrayal

The text of the committee's report, as prepared by the committee staff, makes no attempt whatsoever to cite testimony presented by the League of Families as an organization, or of the individual families who oppose unwarranted case reviews.[28] Instead, the committee report goes back to 1974 to cite testimony before another committee from a former MIA wife who favored status changes on all of the missing men. They also cite testimony from two wives who favored status changes and even mention a letter and a phone call received from a wife with the same feelings.[29]

Only in a footnote do they mention three wives who testified before the committee opposing status changes and calling for a study of the pertinent sections of the U.S. Code which deal with status reviews.[30] The report never mentions hundreds of letters the committee received from primary next-of-kin who oppose the status changes. Further attempting to slant their report to make it appear the families favored reviews, the committee staff went so far as to print, out of context, testimony from an MIA wife who opposed status changes, making it appear that she favored the government declaring the men dead.[31] Nowhere in the report is the obvious record engineering more comprehensive than in its dishonest portrayal of POW/MIA family attitudes.

According to the committee's report, the basis for their recommendation to immediately reinstitute case reviews is due, in part, to the financial benefits the missing man or his dependents are continuing to receive. For some six pages, the report discusses the benefits available to POW/MIA wives saying that, "continued payment of full pay and allowances in these cases is grossly inequitable to the survivors of the 57,000 Americans killed in action."[32] The report never bothers to point out that no one objected when these same benefits were going to the returned POWs and their dependents. Nor do they bother to point out that the families of the killed in action have not had to live in the limbo status or deal with the frustrations the MIA families have encountered in trying to learn the fate of their loved ones.

The report also never mentions that the families have suggested many times that they are willing to have all financial benefits terminated, if indeed this is the main reason why the government wishes to presume all of the men dead. Instead, the committee's report endeavors to paint the POW/MIA families as over indulged money grabbers who are "ripping-off" the government.

In another committee argument for status changes, the report claims, "A significant number of cases were found by the select committee to contain solid evidence that the individual was dead." It is important to point out here that the committee never defines "significant number" or "solid evidence" and neglects to mention that they perused less than 200 of some 800 files of men still officially listed as POW or MIA.[33]

A third reason the committee cites in their case for status changes is that to reduce the number of POW/MIA cases would take the pressure off the United States government "to rush into acceding to Vietnamese demands" in return for POW/MIA information.[34] The League believes that the committee is correct when they say status changes would take pressure off the U.S. government. Unfortunately, it is also highly likely that the removal of pressure would result in government inaction and no MIA accounting whatsoever. In the final analysis, it would also take the pressure off of the Vietnamese.

In view of the recently initiated talks between the United States and Vietnam, with the MIA issue the focal point of the U.S. position, the League of Families is of the opinion that to declare the men dead now would be irresponsible and would weaken the U.S. position. For the first time in four years there is an opportunity to obtain factual information on the missing men. To declare everyone presumptively dead at this time would deny the Carter administration the opportunity to conduct comprehensive, successful negotiations.

The following editorial, reprinted from the San Angelo (Texas) Times sums up the League's opinion of the select committee's recommendation:

A-289

MIA - A Blow For Accounting

A special U.S. House committee said Wednesday that it can find no evidence to suggest that there are any Americans being held captive in Indochina as a result of the Vietnam war.

At the same time the committee concluded all the MIAs are dead, it recommended that the U.S. continue to press vigorously for as much information as possible on those whose fate remains a mystery.

The committee's findings are unfortunate -- all the more so because they may blunt current talks between the U.S. and Vietnam in Paris designed to find a solution to the MIA problem. With an official committee of the U.S. House "declaring" all the MIAs dead, the public pressure for a full accounting may begin to decrease. The conclusion also asks that we believe the Vietnamese are using non-existent MIAs as leverage in trying to secure economic aid and admission to the United Nations.

What the committee says may very well be true -- or nearly so. But the fact remains that until the Vietnamese make a full accounting we have no way of knowing if anyone is alive or what happened to those who aren't. We do not expect to suddenly, miraculously be presented with 2,546 live Americans returned from Indochina. But some of them may be alive and it is certain that the Vietnamese, Cambodians and Laotians know what happened to many of the rest.

In fact, we can think of only one positive thing that can come of the conclusion of the panel. If the Vietnamese think the U.S. government believes the prisoners are all dead, as expressed by the panel, then they may stop using MIAs as a point of leverage against the U.S. If the Vietnamese should perceive such a thing they might feel it is fruitless to continue to bargain MIAs against American concessions.

If that happens, one of two things could result:

-- The Vietnamese could just forget about the whole MIA question.

-- They could cough up whatever information they have.

Judging from past performance, the second alternative is unlikely.

There are undeniably still Americans unaccounted for in Southeast Asia. Whether alive or dead, their families still have a right and a need to know what happened to them.

The committee's report will not ease their pain or answer their questions and may very well make an accounting impossible to achieve.

Committee Conclusion

> "That, because of the nature and circumstances in which many Americans were lost in combat in Indochina, a total accounting by the Indochinese Governments is not possible and should not be expected.
>
> That a partial accounting by the Indochinese Governments is possible, and that the Department of Defense has the capability to assess, within reasonable limits, the nature and extent of any accounting that may be forthcoming.
>
> That the most effective way in which an accounting may be obtained is through direct governmental discussions with the Indochinese Governments."

The League strongly agrees with the committee conclusion that direct governmental discussions are the most effective way to obtain an accounting for the prisoners and missing, and, in fact, the League has espoused this position for a number of years.

A previous committee position, suggested to them by the Vietnamese in December 1975, was to gain information on a gesture-for-gesture basis. This would mean that for every tiny bit of information the Vietnamese dribbled out, the U.S. would be expected to make a substantial reciprocal gesture of "friendship," such as lifting the trade embargo or allowing the Socialist Republic of Vietnam (S.R.V.) into the United Nations.[35] After some months the committee became convinced that such a gesture-for-gesture approach to an accounting would be unacceptable and would drag on for numerous years.

At a meeting with Secretary of State Henry Kissinger in March 1976, the committee discussed the possibility of direct negotiations with the Vietnamese. Surprisingly, the Secretary accepted this concept and promised to discuss it with the President. Thereafter the committee adopted the position of persuing direct, diplomatic talks.[36]

The League also agrees that a total accounting of all 2,546 POWs, MIAs and KIAs (BNR) may not be possible. However, the committee, in an unprecedented display of irresponsibility, speculated on the number of men for whom an accounting could be obtained. Using methods that remain unknown to the League of Families and to the Defense Department, the committee capriciously announced that the U.S. could expect to receive approximately 150 remains of missing Americans.[37] From evidence already in Defense Department files, we can state unequivocally that this could only happen if the "accounting" was an incomplete sham.

The League is repelled by such wild, unfounded speculation on the part of the committee. Congressmen Gilman and Guyer, in their separate remarks for the record, also express dismay with such a conclusion saying, "To assign any numerical limitation to the amount of information or remains which the governments of Indochina possess is premature and unwarranted speculation on the part of the committee. To limit arbitrarily the amount and type of information we demand could result in discouraging Hanoi, Vientiane and Phnom Penh from providing all the information they have available. We believe the governments of Indochina, even though there are many men for whom they could never account, are already in possession of a substantial body of information on our missing men. We should not inhibit a full revelation of that information by assigning any numerical limitation to the fullest possible accounting which we all seek."[38]

In a feeble attempt to support their claim that few men can be accounted for, the committee's report quotes extensively from a few unusual cases where there is little hope that the Communists would have information. It appears the committee projected minute amounts of casualty data upon the entire unaccounted for population to minimize the number for whom an accounting could reasonably be expected. The report also connects the devastating effects of the trauma of the incident loss and the ravages of the environment to encourage the proposition that remains, even if recovered, would defy identification. This is in direct conflict with the history of successful identifications made by the Central Identification Laboratory. The fact is, the Communists do have information on an unknown number of MIAs, and have publicly admitted so on several occasions.

The report also tends to contradict itself in its claim that of the 2,546 cases, only 436 are considered unrecoverable. This leaves over 2,100 cases where remains could be produced. The report also says that 179 aviators are positively known to have ejected from their aircraft and goes into some detail to explain that the Vietnamese are known to have been collecting MIA data for a number of years. They also say the approximate crash sites are known in 46% of the MIA cases. Therefore, based upon the information that the committee report cites, it is reasonable to assume that far more than 150 remains can be returned.[39] Of all the committee's "findings," this is potentially the most irresponsible and harmful as it could be used by the Vietnamese as an excuse for failing to provide the fullest possible accounting.

The Committee and Dr. Kissinger

Since the signing of the Paris Agreement in January 1973 the MIA families and many other Americans have been suspicious about the possibility of secret agreements between the two countries. The League has been especially suspicious due primarily to Kissinger's unfulfilled promise that the MIAs would be accounted for within 60 days of the signing of the agreement.[40] Therefore, even prior to the formation of the committee, the League was anxious to hear from the Secretary of State and learn what he was doing to gain an accounting. Montgomery promised the families that Kissinger would be called in immediately to testify before the committee.

When the committee was formed and the first hearings were underway, the League repeatedly asked when Dr. Kissinger was scheduled to appear. Finally Montgomery announced that the Secretary wasn't going to testify but had agreed to have breakfast with the committee at the State Department. After their private meeting, when League officials asked what had transpired, they were given a committee press release.

Throughout the tenure of the committee, the League, concerned citizens and several members of the committee, repeatedly asked Chairman Montgomery to subpoena Kissinger, if necessary, to get him to publicly answer for the failure to receive an accounting. Montgomery refused to subpoena Kissinger, who would not appear voluntarily.

Further, Kissinger had lied to the committee during their breakfast meeting. He claimed that there were no secret agreements or codicils to the Paris Agreement. However, when four of the committee members visited Hanoi in late December 1975, the Vietnamese referenced a letter from former President Nixon discussing some $3.25 billion in reconstruction grant aid. Thus, the now-famous aid promise was for the first time revealed.[41]

Upon returning to the United States, one would have expected the committee to tell someone about the Nixon letter or at least try to gain more information on it. Instead the committee did nothing. However, a committee consultant who had accompanied the group to Hanoi, discussed the letter with a member of Senator George McGovern's staff who had just received similiar information from the Vietnamese. Based upon information supplied by the committee consultant and Senator McGovern's office, the New York Times broke the story as front-page news on February 2, 1976. Even when the existence of the Nixon letter was first made public, some select committee members attempted to downplay the story. Finally they did admit they were aware of the letter and would attempt to obtain more information on it and a copy from the National Security Council. The National Security Council refused to provide the letter, but did admit its existence.[42]

The League once again called upon Montgomery to subpoena Kissinger and the letter, but he refused to do so. Hence, the text of the memo remains unknown.

Thus, Chairman Montgomery's blind-faith acceptance of State Department claims are evident throughout the committee report. Mr. Moakley, in his remarks, expresses skepticism of the "Nixon-Kissinger secret diplomacy." The League of Families feels that this subject is one needing additional investigation.

Final Thoughts

In conclusion the National League of Families would like to extend its sincere appreciation to those committee members who conscientiously pursued an accounting for the missing and who did all they possibly could in the face of great odds to produce a conclusive final report. The League is especially grateful to the five members of the committee who presented, or attempted to present, views in opposition to the conclusions and recommendations of the final report.

It should be further noted that the League maintains its long standing position that the United States must not make any concessions to the governments of Indochina such as approving membership in the United Nations, lifting the trade embargo, granting reconstruction or other aid, etc., without built-in safeguards which will insure an accounting of our men.

In view of President Carter's recent initiatives to pursue diplomatic discussions between the U.S. and Vietnam in an attempt to gain an accounting, the National League of Families is hopeful the POW/MIA problem will soon be resolved.

###

FOOTNOTES

1. "Purpose of the Select Committee," Final Report of the House Select Committee on Missing Persons in Southeast Asia, p. II.

2. "Letter of Transmittal," Final Report of the Select Committee, p. V.

3. Select Committee Hearings, Part IV, p. 65.

4. The Washington Post, "MIA Families Fight a Lonely Battle," July 18, 1976.

5. July 1976 Letter to Montgomery from the League's Executive Director.

6. From conversations with committee members and committee staff.

7. Final Report of the Select Committee, pp. 257-259.

8. Ibid., pp. 255-256.

9. January 13, 1977 Letter from Congressman Jim Lloyd to a League member.

10. Committee members who disagreed include Representatives Benjamin A. Gilman, Tennyson Guyer, Jim Lloyd, Joe Moakley and Richard Ottinger.

11. From conversations with the committee staff and with the Defense Department and State Department liaison personnel.

12. August 3, 1976 Memo from McCloskey to Montgomery. Copy in League files.

13. From conversations between League officials and Dr. Dittberner.

14. August 3, 1976 Memo from McCloskey to Montgomery.

15. Select Committee Hearings, Part III, pp. 138-162.

16. Final Report of the Select Committee, pp. 29.

17. Ibid., p. 103.

18. Ibid., p. 75.

19. Select Committee Hearings, Part IV, pp. 1-20.

20. Final Report of the Select Committee, pp. 205, 64.

21. Ibid., p. 146.

22. Ibid., pp. 52-61, 68.

23. Ibid., p. 229.

24. McDonald v. McLucas Final Decree, March 5, 1974 issued by the U.S. District Court, Southern District of New York.

25. Final Report of the Select Committee, p. 182.

26. Ibid., p. 255.

27. Statement by Montgomery at September 13, 1975 meeting of the League's Board of Directors.

28. Select Committee Hearings, Part I, p. 66,

29. Final Report of the Select Committee, pp. 182-187.

30. Ibid., p. 187.

31. Ibid., p. 187. Also see Select Committee Hearings, Part IV, pp. 92-107.

32. Final Report of the Select Committee, p. 190.

33. Ibid., p. 6.

34. Ibid., p. 190.

35. Ibid., p. 10.

36. Ibid., p. 12.

37. Ibid., p. 232.

38. Ibid., pp. 257-258.

39. Ibid., Chapter 9.

40. Statement made by Dr. Henry Kissinger at a White House News Conference on January 24, 1973. The previous evening, in a nation-wide address, President Nixon had made a similar assurance.

41. Final Report of the Select Committee, pp. 114-117.

42. Ibid., pp. 114-117.

AFFIDAVIT OF MARY K. BOSILJEVAC, FOR PLAINTIFFS, IN OPPOSITION TO CROSS-MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--x

EARL P. HOPPER, JR., et al.,

Plaintiffs,

-against-

JAMES E. CARTER, JR., et al.,

Defendants.

--x

Index No. 77 Civ. 1793 (JBW)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARY K. BOSILJEVAC, being duly sworn, deposes and says:

1. I am in this lawsuit acting as wife, next friend and conservator/guardian of my husband, Michael J. Bosiljevac (plaintiff) I make this Affidavit in response to Defendants' Motion for Dismissal under Rule 12(b) because I am informed that the motion is considered as though it was a motion for summary judgment and that an affidavit of a party is desirable.

2. I have read the Affidavit of Dermot G. Foley, dated September 22, 1977, as well as his Affidavit in support of the original application for the temporary restraining order in this action. Furthermore, I have attended the trial thus far. The plaintiffs have placed proof in the record through these affidavits and through testimony on all of the issues in Counts II and III of the Complaint. I have seen little rebuttal evidence of substance.

3. On the basis of the foregoing, I believe I can truthfully state that factual issues do exist in this action and to the extent that the defendants have failed to produce evidence rebutting that offered by plaintiffs, plaintiffs should be awarded judgment at the present time. Otherwise, factual issues remain and the defendants' cross-motion for dismissal should be denied.

4. With respect to the issues raised in Count I of the Complaint, which, by themselves, could be dispositive of this lawsuit, I submit that there are no factual issues since the challenged legislation must stand or fall on the basis of its own text.

5. I am informed that our attorneys have briefed to the Court the issues relevant to Count I of the complaint and I request that the Court grant judgment in plaintiffs' favor on that count.

6. If this is done, the case would end, if the Court would then simply void the statute.

7. Although there has been no opportunity to say this before, I would like at this time to tell the Court that neither I nor anybody I know in the POW/MIA situation seeks the perpetuation of missing status. That is not why we are here. We are here because the present statute, both on its face and as applied, is not only unconstitutional but unworkable and undesirable. We are here because we want to get rid of this law and go to Congress in search of something which will replace with decency the insensitivity and

arrogance that characterize the one-sided, unfair proceedings which now occur.

8. I can candidly state that if my husband gave devotion to his job as limited as the devotion I see to fairness and decency in status review proceedings, he would probably be home today rather than in the situation in which he and all of us find themselves.

WHEREFORE, I respectfully request that the Court deny the Defendants' Cross-motion for dismissal and either grant judgment now in plaintiffs' favor voiding the statute or or grant the plaintiffs injunctive relief so that we can proceed with the fight on some fair grounds.

MARY K. BOSILJEVAC

Sworn to before me this
22 day of September, 1977

[illegible] F. FOLEY
Notary Public, State of New York
No. [illegible]60750
Qualified in Bronx County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-------------------------------x

HOPPER, et al., :
Plaintiffs, :
-against- : 77-C-1793
CARTER, :
Defendant. :

-------------------------------x

United States Courthouse
Brooklyn, New York

September 19, 1977
10:00 o'clock A.M.

Before:

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

MICHAEL PICOZZI
OFFICIAL COURT REPORTER

Appearances:

DERMOT G. FOLEY, ESQ.
Attorney for Plaintiff
122 East 42nd St.
New York, N.Y.

-and-

JOHN A.K. BRADLEY, ESQ.
51 East 42nd St.
New York, N.Y.

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: ELAINE BUCK, ESQ.
Assistant U.S. Attorney

THE COURT: Hopper v. Carter. The letter of Mrs. Sandra Rbors was received this morning and was filed and docketed and was shown to counsel before convening this trial. We'll go forward with the trial. Produce your first witness, please.

MS. BUCK: First I would like to make it clear that the Government did not solicit that letter. Second, we have another affidavit that we would like to submit from a woman which spells out simply her position.

THE COURT: Mark this as a Government exhibit.

MS. BUCK: There are a few preliminary matters.

THE COURT: Does the plaintiff have a brief?

MR. FOLEY: I'm sorry, Sir. I do.

THE COURT: I received the Government's brief Friday and I spent all day going through the papers on the cases. I have all documents but I did not have the plaintiff's brief.

MR. FOLEY: I'm sorry, your Honor.

THE COURT: I am going to read the brief and we'll take a five minute recess. Then I'll hear your first witness.

MR. FOLEY: Your Honor, I object to the letter received by the Court as an ex-parte document. We do not know the lady and we did not know that she wrote that letter and we have had a very bad history in these kinds of cases about these kinds of letters. The problem is --

THE COURT: If you object I will consider this as part of the record. Mark it in evidence. There is no question that this is an exhibit for identification rather than a Court exhibit.

THE CLERK: Court's Exhibit marked for identification.

THE COURT: In the course of the trial I will not consider this.

MS. BUCK: Your Honor has a motion which I would like to explain to the Court --

THE COURT: What is the motion?

MS. BUCK: To dismiss --

THE COURT: I'll hear the evidence first of the plaintiff.

MS. BUCK: There is another problem. On Friday at 5:15 the plaintiff served subpoenas on me for individuals and documents. These people are in Washington and as far as the Government is concerned, that the service, that the Government feels that these are not effective and does not feel obligated to supply these people.

THE COURT: All right, we'll take a five minute break.

DERMOT G. FOLEY, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRADLEY:

Q Mr. Foley, what is your occupation?

A I am an attorney.

Q And where did you go to law school?

THE COURT: I know Mr. Foley's background. He is a distinguished member of the Bar.

MR. FOLEY: Thank you, your Honor.

BY MR. BRADLEY:

Q Mr. Foley, specifically, have you litigated any cases involving persons missing in action?

THE COURT: I concede that in the record.

BY MR. BRADLEY:

Q Mr. Foley, I direct your attention to a point in this particular case, previous to this did you file a motion for an order to show cause?

MS. BUCK: Objection, your Honor. All these things are a matter of record.

THE COURT: Let counsel warm up.

BY MR. BRADLEY:

Q Did you apply for a temporary restraining order?

A Yes, I did.

Q Did you furnish support ~~applications~~ affidavits for the temporary restraining order, did you submit an affidavit?

A Yes, I did.

Q And, that affidavit was dated September 6, 1977. I want to direct your attention to certain parts of this affidavit. Do you have it in front of you?

A Yes, I do.

Q First of all, --

MR. BRADLEY: Your Honor, may I confer with counsel for one second?

MS. BUCK: Your Honor, the Government objects to the manner in which this is being conducted. This is totally unorthodox. If he's the witness and he's the attorney, okay, but this constant negotiating --

THE COURT: All right, proceed, please.

BY MR. BRADLEY:

Q Just to return to one point of the qualifications. Mr. Foley, in addition to actually conducting litigation involving M.I.A.'s, have you performed any other legal role related to the M.I.A.?

A Yes, I have been general counsel to the National

Organization, ~~O.P.E.~~ of POW and M.I.A. families and I have functioned as counsel for that organization and to the M.I.A. families on a continuing basis for over a period of several years.

Q Now, returning to this affidavit, I wish to direct your attention to page ten of the affidavit, specifically, do you have that in front of you?

A Yes, I do.

Q And, in this affidavit, paragraph twenty-one, where you discuss the procedures or lack of procedures for giving notice to subject M.I.A.'s, what is the procedure for notice?

MS. BUCK: Objection. This witness is not qualified to and has not been qualified to testify to that. These are Government procedures that are set forth in the statutes.

THE COURT: I'll overrule the objection.

A They point out --

Q That's on page ten that you are referring to?

A Yes, sir.

Q It refers to the allegations that we made in the ~~that an affidavit~~ Complaint, to the effect that when a proceeding is scheduled which can lead to a determination of death under the Missing Persons' Act, there is an absence of, no notice to the subject M.I.A. or to any person functioning as his representative free of conflicting interest. That is the notice to the pendency of the proceeding and an opportunity to appear for the purpose of representing the interests of the subject M.I.A. You're asking me if that is true?

Q Yes, sir.

A It's true. It's true of the cases of all three services.

Q In other words, none of them have any provisions of giving notice to the subject M.I.A.?

A Or to any representative or to pick a representative that is free for the purpose of representing his interest as opposed to relatives' interest. There isn't any provisions in it to appoint a special guardian of any kind and everybody knows it would be helpful if it was.

Q Now, on page 11, sub-paragraph B, this refers to the fact that a hearing is a non-adversary hearing, perhaps you can tell us what is purported in this particular paragraph?

A This aspect of ~~is~~ a status review which was described in that sub-paragraph B ~~A~~ goes to the fact in the event that any person is granted any kind of a "hearing" with respect to a ~~an~~ status ~~established~~ review apart from the fact that the hearing is one where there were no representatives there, only the person~~n~~al interest~~ed~~s other than those of the M.I.A. It's objectionable because they did not have at the hearings. They were not heard by the person who makes the determination. Sometimes they were heard by a person, they would have an interview with an individual usually from the casualty office of the services which were involved and that individual works closely with, if not indeed actually is involved in the preparations of what I call the Government's side of the case and the prosecution of the status review. It would be analogous to ~~what~~ a person, in Federal Court having difficult with the Federal Government, being granted not a trial before a judge but an interview before the prosecuting attorney who will then decide what they would like to convey to the Court. That's the objection raised in that paragraph and those are the facts.

Q Are they true of the relations of all three services?

A Not are they only the relations but this is the way it works.

Q And, you're familiar with that, the way it is being handled over the years?

A I am familiar with it at this time. Particularly, the way it has been handled in recent times. It's been bad for years. I'm familiar with it because I am constantly in contact with the families that are subjected to this and I have read the materials that are available.

Q Going on to sub-paragraph ~~B~~ G it says that there was no criteria or stand~~s~~ards or policies to govern the secretary, is that in fact true?

A That is in fact true. In the case of McDonald v. Lucas, the Government in fact stipulated to the Court that was so. Since then there have been no alterations in the regulations which have changed or altered the situation. I may add what they stipulated to the Court it was in fact a signed stipulation submitted in the McDonald case as part of the record. It has not been altered since then. In addition to that, I can say, apart from saying that it would be reasonable or it would be nice, nobody knows right now and nobody has any strict rules, other than on and off regulations ~~that~~ that lay down when and for what precise reasons you can be given the status review or for ~~. For~~ what precise reasons you can make a determination of death. The result of that is that it is very very difficult if not impossible to take a record of a status review and determine from that what was done right and wrong. It's something like, it's the question of making the rule up as you go along. It's not subject to any kind of supervision.

(Continued on next page.)

Foley-direct

Q And, going to subparagraph D, it says: the secretary, as far as the secretary is concerned, as a matter of course, makes the determination of death in the total absence of any evidence or information of the fact of death?

A Yes, and the regulations ~~is~~ and the statute make provisions for this, in ~~In~~cases of presumptive determination of death. Apat from it, on its face, an additional objection is to say, of course, when these determinations are being made they are being made at a time where we are all told, we all do believe that every effort to obtain additional information is still continuing. It's made without evidence while what, under the Enoch Arden ~~Earden~~ Law, is referred to as a diligent search is still under way and it's true.

Q Now, subparagraph E says that the secretary routinely fails to conduct any hearings whatsoever when requested by next of kin who is the recipient of Government benefits?

A Well, we'll put on testimony in this case, that it is true. It's true of the next of kin who are the recipients of Government benefits signs a waiver, they waive not only their right, but they obliterate the rights of the subject M.I.A., regardless of what the motives or purposes of the next of kin were.

Q Does the Government have any kind of proceeding for inquiring into any possible conflict of interest on the subject M.I.A.?

A None whatsoever.

I refer to, particularly the record of one plaintiff in this case Brent Davis, in which there was an outrageous open and known conflict of interest and nothing else happened

MS. BUCK: Again the Government would object to this line of testimony based on hearsay. The witnes has not been qualified with respect to expertise on this matter.

THE COURT: I'll take his testimony, but make it brief. Let's hear the material that isn't already in the record. I have all of this in his affidavit.

MR. BRADLEY: I will not keep mentioning this on the subject of his qualificationssince your Honor has held he is qualified --

THE COURT: Let's get to the facts.

BY MR. BRADLEY:

Q Now, going to subparagraph F, thestatus reviews are authorized to continue even while the investigation is continuing?

A Yes.

Q Inother words, it would be possible for them to make a determination of death and then get additional information?

A Yes, sir.

That did happen specifically to one of the plaintiffs. That's the case of Mike Varnado.

Q In such cases, do they reverse the status of death?

A No.

Q Do they reg rant a rehearing or anything similar to that?

A No, they do not.

Q Going on now to paragraph G, what requirement is there for them to marshal the evidence?

A The only evidence that they marshal, you see, in questioning,in gathering up the information is the stuff in the files, in the casualty office. It's alleged that this file matches up the file which is maintained by an organization known as J.C.R.C. which is now centered in Hawaii. We have numerous instances where in fact the records were not in conformity with one another. Apart from that, we intend to prove in the course of this trial that there is a vast amount of evidence and information and sources other than the casualty office file and indeed, outside of the particular branch of the service. Say it's an Army M.I.A. and the material that they have, happened to find, in whatever condition it's in, they may consider it improper to show. There is a vast amount of other information that should be ordered fromother places within the Government. I'm not talking about Vietnam, I'm talking about stuff that is available to the United States Government. There is no provision that I know of. In fact, it is my understanding and my experience in this thing, it indicates that they do not go and gather all the materials in the C.I.A. or the D.I.A. and wherever else it can be obtained.

There is one other problem and that the regulations maintain any of that information is classified, it's not considered regardless if, publicly you had a sighting ~~citing~~ report of a particular man.

Q What is a "Sighting ~~Citing~~ Report?"

A A Sighting Citing Report --

THE COURT: I have read all of this, Mr. Bradley.

BY MR. BRADLEY:

Q Are there any witnesses who appear in these status reviews,particularly referring to paragraph 8?

A No, sir.

They are not. I believe what we are going to establish here is that they are done just with documents which is my understanding. Most of these documents are statements of which witnesses which were prepared by third parties and sometimes there was objections madeby the witnesses. There was no cross-examination, no testimony, no way to get at these witnesses. We are going to have one of the witnesses in this trial who will put out that practice --

MS. BUCK: Objection.

The witnesses can speak for him and herself.

THE WITNESS: I'm trying to round out the picture of that particular answer. The practice is that if somebody in an M.I.A.'s family wishes to contact a particular witness, he's not given the name and address so he can get a hold of them. The practice is that they say we'll notify that man if he wanted to talk to him, but we'll tell him he's not required to speak to you. You can't get the information out. You can't get it from the witness and you can't cross-examine a piece of paper.

Q Relating to the matter on subparagraph J, there is no procedure which reflects discovery or follow through?

A No, there is no rule, of procedural rules, or of evidence whatsoever.

Q Are you saying that there is no rules, procedural rules of evidence whatsoever?

A No. There are no strict rules of evidence. In fact, there is none at all or as far as this proceeding is concerned, there is sort of an outline, but there are no procedural rules in the sense that any member the Bar would recognize.

Q And, in subparagraph L, it says that the ~~sta~~ Stat have become so structured that they have become punitively prohibitively expensive to protect M.I.A. rights; is that true?

A We are going to put in evidence as to the c of one of these, in the sense, we are going to show in a fectly average and normal case, the normal expenses spent diligent lawyers trying to get the work done as quick as possible. The costs and expenses during the course of the would run over $18,000.00.

Q Going on to Paragraph 22 you indicate that burden of proof has been reversed?

A That's happening particularly in instances every man that is on missing status today was the subje a prior status review and now has been continued in mis status because the determination was made either, there no reason to declare him dead or ~~no~~ reason to believe h lived. And in all of those situations it is our experience that you go into the status review and they is there any reason to change what we have been doing s Any reason to decide he's dead. That is not so now. Y told, that you are limited to what you can do by putti proof that the man that you are discussing is alive. It changes the purpose. Indeed, we will expect to have witnesses in this case that not only will establish that fact, but state that he has been told thatif he attempted to go beyond that, this meeting will be closed and he will be put ~~in.~~ out. The burden is switched in the matter, with the basis of the presumption of a continued life which was the former presumption that these proceedings started out with is now changed to a presumption that he's dead and now you have to prove otherwise. That's true. That's the way that they are being conducted today.

Q Now, going on to the next cause of action in Paragraph 23, it reflects a determination of death without evidentiary support --

A That is correct. That is covered in the evidence, the testimony already.

Q Now, in Paragraph 24 are the facts and allegations in Paragraph 24 true?

A The facts and allegations in Paragraph 24, there is a large amount of available information which can be obtained and which is not. That is true. I have testified to this before and I think I'll just be repetitive to cover it again.

Q Just on one point, what is a summary ~~defense~~ ~~Report~~ Record referred to?

A The way that works is that prior to the establishi of a review, a summary of a particular case is made by the casualty office in question. It ~~returns~~ consists of a page or a page and a half report that summarizes, virtually in every case I have spoken to in the last several weeks and quite a while before that, to some extent, before, I would say, where a family would see this and have some knowledge of what was actually contained in the file or a portion of the file that they were allowed to see generally, they found large errors in those summaries, that were different, even though the service regulations provide thereafter, even though the files so called, which were regarded as defective files even though that file will accompany the pack of papers that move from hearing officer to reviewing board, whoever it is, whoever makes the decision that that man is dead, right on top of that summary it's done in such a way that the inclination of any ~~f~~normal human being would say why do I have to read these inches and inches of paper if a particular service is informing me, is telling me that it is a verification of what is in the summary.

(continued next page)

1AM3
HG/JW

Q In summary, going on to paragraph twenty five, are the facts and allegations therein true?

THE COURT: Well, I don't know. It seems to me to be an insulting question to put to a member of the Bar when he has given an affidavit. With all due respect, I would like to hear the evidence. I have your affidavit.

MR. BRADLEY: May we go forward a second?

THE COURT: What are you going to tell me that I don't already know. I spent days going over this file and I have read all of these pieces of paper.

THE WITNESS: Essentially, the point here, your Honor, is that we are at trial and not on a motion as far as the normal sence. What I am doing ~~go~~ is giving my testimony because I believe anybody who offers to testify in this Court makes themselves available for cross examination.

THE COURT: If that's the only reason let's stop. Do you want to cross examine him?

MS. BUCK: Your Honor, may I make a point? It's my understanding under Rule 65 if it's consolidated any matter that is put in.

THE COURT: Do you want to cross examine him?

MS. BUCK: I don't think so.

MR. BRADLEY: I have just a few more questions. I'm through with this particular line. I'm not through with this witness.

THE COURT: Let's move on to something that is relevant.

THE WITNESS: If I may on the last question, your Honor, without going into details, I was asked of Paragraph 25 is factually correct. In accordance with my experience and observations, the answer is yes.

BY MR. BRADLEY:

Q Just one final clean-up question on this affidavit, you refer to ~~loose~~ Loss of international law rights under the Paris Agreement, what special rights are those?

THE COURT: Sustained. Let's move ahead shall we.

BY MR. BRADLEY:

Q I direct your attention to March 25th, 1975, excuse me, March 28th, 1975, on that date, did you m ake a Freedom Of Information request?

A Yes, I made three of them.

Q Who did you communicate with?

A All three were substantially identical. They were made to the Central Intelligence Agency and the State Department and

Department of Defense. Apart from changing Mr. Hopper's address, the demands were quite extensive and were substantially identical.

Q I show you this document, what is it?

THE COURT: Are you going to offer them in evidence?

MR. BRADLEY: Yes, your Honor.

THE COURT: All right, mark them in evidence.

THE CLERK: (Whereupon, Government's Exhibits were marked in evidence.)

THE COURT: Show them to Ms. Buck.

(Handed.)

THE COURT: While she's eamining them, do you have any further questions? Just mark everything in evidence including the responses. Let's move ahead.

BY MR. BRADLEY:

Q Did you have any telephone conversations with any persons in any of those agencies in connection with this Freedom of Information Act?

A I had telephone and personal conversations both with the State Department and with the Defense Department with respect to why there was such voluminious uncorrelated ~~unrelated~~, unindexed files which there are. I was inquiring

As to whether or not these were being made available for the status reviews and on one particular occasion I was informed --

MS. BUCK: I object to the hearsay.

THE CLERK: Plaintiff's Exhibits 1, 2 and 3 marked in evidence.

A With respect, for instance, to the State Department I was informed over the phone that there was, described to me eight hundred and seventy five feet of uncorrelated and unindexed documents which are on the subject of the MIA accounting which are not and have not been reviewed or indexed. Nobody really knows what is in there and there was an attempt to get that confirmed in writing and in a letter to the State Department which is one of the exhibits we have marked here, I just want to lay that fact out. We never received any kind of written reply ~~death certificate~~ or anything like that. I believe that the documents we have marked in evidence reveal also the vast quantity of uncorrelated documents there also which are not in the so-called files which we are lead to believe tell the whole story when the status review is being made. They are not ~~only~~ in the files. It's the sort of a thing that nobody can get out and under that, because of the requirement under the Freedom Act, and because of the voluminous documents, it has been stated that they may run as much as three and a half million pages that we haven't seen. We are relying on the size and number of documents and various other sources of information like that. I am absolutely convinced that it is voluminous.

Q If they were made available to you, would you have the willingness and capabity to go through them?

A The difficulty about the Freedom Information request we made was that there was such a staggering volume of documents involved, that if we had to make photocopies of the documents, if they were made available, we could run into money figures in the amount of three hundred and fifty thousand dollars for xexorxing alone. We could just hope that they would be made available without charge. As long as the number of pages are high we would need a source for funds. At this point we are unable to proceed at this time. We are looking for sources at this time and we will try and I think that somebody should get that information otherwise we'll never know what went on here.

(Continued on next page.)

MP/RMG
2AM/1
1

DIRECT EXAMINATION

BY MR. BRADLEY: (Cont'd.)

Q To go on to another point, should there be an examination made by the Armed Services, would there be any form of irreparable injury suffered by the M.I.A. --

A Yes, we have --

MS. BUCK: Objection.

A We have --

THE COURT: Sustained.

Q Now, under Section -- I mean Title 10, United States Code, Section 2771 --

THE WITNESS: Your Honor, I wonder if I might be heard?

THE COURT: No.

Q Under Title 10, Section 2771 of the United States Code, what exactly would be the impact on the next-of-kin on the M.I.A. --

MS. BUCK: Objection.

THE COURT: Sustained.

Q Mr. Foley, in the course of your law practice, have you ever handled some of the Enoch -- Arden --

MS. BUCK: Objection.

THE COURT: Sustained.

MR. BRADLEY: I suggest this is relevant. The

Government indicated the analogy with the instant procedure and suggested no special guardians are appointed because of the particular section of law which provides for Enoch-Arden --

MS. BUCK: Excuse me.

MR. BRADLEY: I called Mr. Foley as an expert in New York law and expert in Enoch-Arden, from which he is familiar, and I would ask him to testify on that point.

THE COURT: Sustained. Too remote.

Mr. Foley, have you made any efforts that you have -- excuse me. Let me back up.

These status reviews are governed by, I believe, 37 USC 555 to 556?

A Yes.

Q Have you made any effort to get those sections amended?

MS. BUCK: Objection.

THE COURT: Sustained.

Q Mr. Foley, what exactly is the object of this lawsuit?

THE COURT: Sustained.

Q Mr. Foley, what personal efforts have been made to gain the due process rights aside from litigation?

MS. BUCK: Objection.

Q Which you claim are lacking --

THE COURT: Sustained.

THE WITNESS: On another point --

THE COURT: Sustained.

MR. BRADLEY: I guess that is it.

MS. BUCK: I have a few short questions.

MR. BRADLEY: I do have an additional question.

Q Have you dealt with the appointment of guardians --

MS. BUCK: Objection.

THE COURT: Sustained.

MR. BRADLEY: I have no further questions at this point.

MS. BUCK: The Government would make it clear we object to each and every part of the testimony given by Mr. Foley.

CROSS-EXAMINATION

BY MS. BUCK:

Q Mr. Foley, I believe you testified before about the hearing and the procedure afforded at that hearing, is that correct?

A Yes.

Q Have you personally been present at any hearing held since McDonald v. --

A Personally attended, no.

Q That is the question.

A No, there have been virtually no hearings.

Q Thank you, Mr. Foley.

Mr. Foley, I believe you testified about an FOIA request?

A Yes.

Q And I believe you considered that that request was denied you, is that correct?

A It would be fair to say that it was denied. I also -- there is more than that.

Q Was it denied or was it --

A It was never concluded.

Q Why wasn't it concluded?

A One thing, I dropped the pursuit because I couldn't afford the price.

MS. BUCK: Thank you.

THE COURT: There will be no redirect.

Next witness.

MR. BRADLEY: The plaintiff calls Susan Sullivan.

THE COURT: Do we have that criminal case ready?

THE MARSHAL: Yes.

THE COURT: Where is defense counsel and the

5

Government?

While taking a short recess, counsel for the Government may get the background of the witness to expedite cross-examination.

Bring in the defendant in the criminal case.

(A recess was taken at this time while the Court attended to another matter.)

THE COURT: Let's go back on the record.

MR. BRADLEY: Your Honor, when I was questioning the previous witness, Mr. Foley, I started asking him about irreparable injury and your Honor sustained the objection to that. I previously had been questioning Mr. Foley concerning the contents of an affidavit and I do want to point out the material which we have submitted is not in an affidavit but in a brief so it is not --

THE COURT: It is not necessary.

MR. FOLEY: Mrs. Sullivan.

BESSIE SUE WALLACE SULLIVAN,

a witness called herein, was sworn by the Clerk of the Court and testified as follows:

MS. BUCK: The Government would like to make an objection. This woman is not a plaintiff and furthermore is a plaintiff in a case presently before the

Court of Claims in Washington. We feel that it is inappropriate and difficult for the Government to cross-examine in view of the fact her case is being litigated.

THE COURT: Overruled.

DIRECT EXAMINATION

BY MR. FOLEY:

Q Mrs. Sullivan, have you given your address for the record?

A 2504 McGregor Drive, Austin, Texas.

Q Mrs. Sullivan, are you the wife of a Lt. Col. Farrell J. Sullivan?

A Yes.

Q Was he ever involved in a status procedure under the Missing Persons Act?

A Yes.

Q What date did that occur?

A I was notified on June 25, 1973.

Q What were you notified of?

A They had changed his status.

Q From missing to dead, is that correct?

A Yes.

Q At the time that that occurred, prior to that determination, were you given any opportunity to participate in any kind of a hearing?

A No.

Q Did you ask for it?

A Yes.

Q Were you denied?

A Yes.

Q Now, in what manner did you get notification that it had been done, this status determination changed?

THE COURT: Was this prior to McDonald?

MR. FOLEY: Yes, Sir.

MS. BUCK: We would like to object.

THE COURT: Sustained.

MR. FOLEY: May I be heard? The reason for this particular testimony is we are going to have two related cases before and after McDonald and a continua- --

THE COURT: I don't want anything before McDonald. I have the plaintiff's general background in Crone v. the U.S., 538 F 2d, page 880, Court of Claims case 1976. That is sufficient.

MR. FOLEY: Would we be permitted to augment that material which we feel is incomplete? There are particular exhibits that are not reflected there and in addition to that it does not reflect the efforts which we made since McDonald to obtain relief under the Missing Persons Act.

THE COURT: Denied. Thank you, madam. I hope it hasn't inconvenienced you too much coming to New York. I know New York is not attractive in some respects.

Next witness.

MR. FOLEY: Mr. O'Grady.

JOHN M. O'GRADY, a witness called herein, was sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MR. FOLEY:

MR. FOLEY: If I may have a moment, your Honor? Mr. O'Grady's file has been misplaced.

(Pause.)

Q Mr. O'Grady, are you the father of John F. O'Grady?

A I am.

Q Did he have a military rank?

A Yes.

Q What was that rank?

A Colonel.

Q In what branch?

A Air Force.

Q Has he been the subject of a determination?

A I was notified there was a change in the status after ten years. It came through that he was presumed to be killed in action.

Q When did you receive this notification?

A (No response.)

Q Excuse me. I want to ask you -- you say you were notified originally that it happened or was going to happen?

A It was going to happen when I called up Col. Gratch.

Q You received a notification from the Air Force that a status review of your son was pending?

A Yes.

Q Was your son married at the time?

A Yes.

Q Was your daughter-in-law receiving allotment under his pay and allowance?

A Yes.

Q Were you informed at the time that you received notification that your son's status review was pending, were you informed as to whether or not there would be a hearing on the matter?

the matter?

A They told me if I want to make any inquiry to contact them. I did.

Q When you contacted them, did you ask if there was going to be a hearing?

MS. BUCK: Objection.

A Yes.

MS. BUCK: Objection, he's leading the witness.

MR. FOLEY: I am trying to get back to the question --

THE COURT: Excuse me. Go ahead.

Q What was the answer?

A The answer was yes.

Q What happened then with respect to the hearing matter?

A I called Gratch. He was in charge of the casualty Division. I called him and asked to have a hearing. And Col. Gratch told me when I telephoned that I was not entitled to a hearing.

MS. BUCK: Objection to the hearsay.

THE COURT: Overruled.

A I was not entitled to a hearing. I then asked Col. Gratch to send me a letter to that effect, which he did.

Q Why did he say you were not entitled to a hearing?

A He said -- I don't know. He gave me a dozen reasons. You couldn't make heads or tails out of it.

Q Did he explain in writing?

A Yes.

MR. FOLEY: Your Honor, I would like to submit as exhibits two letters.

MS. BUCK: If I might see those before you have them marked?

THE COURT: Mark them in evidence, please.

Mark them in evidence, please.

Q Would you identify --

THE COURT: Mark them in evidence, please.

THE CLERK: Plaintiff's Exhibits 4 and 5 marked in evidence.

(So marked in evidence.)

THE CLERK: 4 is Mr. and Mrs. O'Grady and 5 is to Mr. O'Grady.

THE COURT: All right.

Q Mr. O'Grady, plaintiff's Exhibit 4, is that the letter you received notifying you that a status review was being considered?

A Yes.

Q Exhibit 5, is that the letter which you received which explained to you the reasons why you were denied a hearing?

A That is correct.

Q Was there ever a hearing to your knowledge with respect to your son?

A Not to my knowledge.

Q Is it your understanding that at the time that his wife waived his rights in addition to having you as his father he had other relatives?

A Yes.

Q Who were they?

A Seven children.

Q Were any of them permitted to participate or represent him?

A No.

MR. FOLEY: That is all with that witness, your Honor.

THE COURT: Any cross?

MS. BUCK: No cross.

(Witness excused.)

MR. BRADLEY: The plaintiff calls --

THE COURT: I must say I read all of the Government's exhibits and affidavits. There is ambiguity on this point. Some suggest the next-of-kin -- Sit down, madam -- if they have a financial interest would be given a hearing and others seem to say not.

MS. BUCK: One of the problems is time and when writing people all over, they didn't know what I was asking. The situation is this, it is the policy of the Department of Defense that the next-of-kin entitled to receive benefits is given a notice and an opportunity to be heard. If there is no next-of-kin, for example, the situation where a man is single and has two parents, parents will be given an opportunity to be heard and --

THE COURT: I see. If there is a conflict -- in other words, this testimony given by Mr. O'Grady represents what happens where there is a conflict.

MS. BUCK: Yes.

THE COURT: All right.

MR. FOLEY: I may add on that --

THE COURT: No. I don't want further testimony on this issue since it's now established.

(Continued on next page.)

T2R2P1C

THE COURT: Swear the witness in.

MARY KATHLEEN VEYS, BOSILJEVAC, a witness, called herein, was sworn by the clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MR. BRADLEY:

Q Where do you reside?

A Omaha, Nebraska.

Q I'm sorry, I couldn't hear you.

A Omaha, Nebraska.

MR. FOLEY: May I suggest fixing that microphone a littlebit.

THE COURT: I can hear.

Q Will you speak slowly and carefully and loudly so we can all hear you?

Ms. Bosiljevac, are you married?

A Yes.

Q To whom?

A Captain Michael Joseph Bosiljevac, United States Air Force.

Q When were you married?

A August 31, 1968.

Q How long have you known Captain Bosiljevac?

A All my life.

Q When you were married, was he in the Air Force?

A Yes.

Q Subsequently, did he have occasion to be assigned to Asia?

A Yes, to the Korat Air Base.

Q When was he assigned there?

A The first part of November, 1971.

Q What were his duties?

A He was a crew member on an F 105 aircraft, electronic warfare, the back seat position and his duties were to use electronic means to counter and counter measure electronic warfare.

Q Counter the enemies activities?

A To confuse and divert enemy SAMS.

Q I direct your attention to September 29, 1972. Do you recall that night?

A Yes.

Q Would you tell us why you recall that night?

A That was the date that my husband was shot down in North Vietnam.

Q Did you receive any notification?

A Yes, two uniformed officers of the Air Force came to my home and notified me.

Q What did they say?

A Well, naturally not very much. They gave me the notification which is a written form and simply explained with regret that they were notifying me my husband was missing in action.

Q What status was he placed on?

A Missing in action.

Q Subsequently, was there a proposed change of his status?

A Yes, after the releasing of the prisoners of war the families were asked to come together at a meeting and General Russell Ogan came to the meeting and explained to all there present that the remaining prisoners and missing would be declared dead within ayear from that time.

It was in May of that year --

MS. BUCK: Objection, hearsay.

A I was there.

MR. FOLEY: This is not hearsay.

THE COURT: I will permit the answer.

Q Subsequently, was a review heldof your husband's status?

A Yes, in September of 1973, there was a review.

Q What was the determination?

A The determination was to continue him inthe missing status, but there was a recommendation that he was a proper or some such word of case for presumption of dead.

Q A day or two after September 30, 1973, did you receive a letter from the Air Force?

A I believe I did.

MR. BRADLEY: I hand a copy to the Assistant United States Attorney.

THE COURT: Have it marked.

MR. BRADLEY: I'm sorry.

THE CLERK: Plaintiff's exhibit 6 marked in evidence.

(Pause.)

THE COURT: All right, continue.

Q And that was the letter that informed you that he was being held on missing in action status?

A (No response.)

Q I didn't give you a copy.

Is that the letter? What is the import of thatletter?

A Well, it tells me that my husband's case was reviewed and final status determination cannot be made.

It mentions the temporary injunction and basically tells me they didn't make a change in his status. They did review, but didn't make a change.

Q Now, you attended the annual meeting of the National League of Families?

A Yes.

Q Did you go every year?

A Yes.

Q Did you go in 1975?

A Yes.

Q In 1975 -- at the National League, do they make any information available?

A The normal procedure is for the Defense Department to offer a set of records, if requested, to the family so they can take a look at them. That was in a closed setting.

Q What do you mean?

A Well, you make an appointment with the various offices, sometimes they are very loose about that, you go in and an officer opens the file and you sit there and look at it.

Q I am referring to 1974 and 1975, were you permitted to copy the file?

A No.

Q Were you permitted to take notes of what was in the file?

A I can't remember.

There has been so many different meetings to look at the records, there have been times I was told I could not make notes.

Q Going to 1975, did you request the file in 1975?

6

Bosiljevac

A Yes, I did.

Q Did you look at the file in 1975?

A Yes.

Q Did you find any additional documents related to the change or non change of status in 1973?

A I found that the actual review document assigned by the officer to getthe review -- did the review and the General, head of Military Personnel Center -- I noticed exactly what is in it because I remember it, it was marked on the bottom -- the first time I saw it was in July of 1975 at this meeting and it was marked on the bottom: for official use only. I had never seen the document until that time.

Q Were you present at that review discussed in that document?

A No.

Q Had you been previously notified when it was going to take place?

A No.

MR. BRADLEY: I am offering to the Assistant United States Attorney a copy of a document dated September 24, 1973, entitled Subject Continuation of Missing In Action Status beyond 12 months, which I ask be marked plaintiff's exhibit 7.

THE COURT: Plaintiff's exhibit 7 marked in evidence.

MR. FOLEY: Off-the-record, the witness asked me to get a drink.

THE COURT: Of course.

(continued next page)

THE COURT: All right, continue.

Q Now, I show you this document, Plaintiff's Exhibit 7, and ask you what is it?

A This is a document that I found in the Air Force casualty records in 1975.

Q And the sustance of this document is?

A Well, what this is -- it is apparently a document that finalized the review that was held at Randolph Air Force Base.

Q I would like to direct your attention to Paragraph 4 on the second page. Do you see a sentence about halfway down the paragraph in parentheses.

A In parentheses?

Q Do you see that sentence in parentheses?

A Oh, yes I do.

Q Will you read that sentence and the next one?

A It says "(It is not possible to conclusively establish Captain Bosiljevac's ultimate fate because further details concerning him have not been received." While this is an appropriate case for a presumptive finding of death, such determination cannot be made at this time..."

Q Does it say why?

A It says: "The U.S. District Court, Southern District of New York on August 6th, 1973, enjoined the services from making status changes unless the primary next of kin requests in writing that the Air Force not delay action on information in its possession..."

MS. BUCK: Your Honor, the Government objects to this protion of the testimony and that which has preceeded it because it relates to previous --

THE COURT: I will permit it. Go ahead.

MR. BRADLEY: All right.

Q Now, you stated that you saw that document for the first time in July, 1975, is that correct?

A Yes.

Q And what is the date of that document?

A 24 September 1973.

Q Did you attend the meeting of the National League of Families in the Summer of 1974?

A Yes.

Q Did you request the file on your husband of that year?

A Yes I did.

Q Did you review the file of your husband in that year?

A Yes I did.

Q Was that document in the file in that year?

A No, it was not.

Q Did you make any inquiries concerning why the document was in the file in 1975 and not previously in the file?

A Yes I did. And it was explained to me that it was marked "For Official Use Only", and it pertained to the review, and that it was inserted at the later date.

Q You say it was explained to you. By whom?

A I can't remember -- one of the casualty officers from Randolph.

Q And did he indicate where it had been held in the intervening time?

A He told me it was held --

MS. BUCK: I object to the testimony as hearsay.

THE COURT: Overruled. It isn't hearsay.

MS.BUCK: If she is testifying as to what he told her.

THE COURT: Of course. How can the Government speak except through its representatives. This isn't hearsay.

Proceed.

A (Continuing) Okay. He told me --

MR. BRADLEY: Just relax, Mrs. Bosiljevac.

A (Continuing) he told me -- he simply told me that there were numerous documents in separate files. It was referred to as an SMR file in my husband's case, and some documents were classified "For Official Use Only," and he explained this was an earlier date and then inserted in the record.

Q Did he tell you that the SMR was not available to you?

A Yes -- well, I asked about the SMR file, the nature of it, and I remember asking just a couple of weeks ago again about the SMR file, and the guy said, "The classified?"

I said, "Well, I don't know."

Q Did you make a personal investigation concerning the facts of your husband being shot down and the subsequent events attendant upon that?

A Yes I did.

Q During the course of that investigation did you determine the existence of any other files?

A Yes.

Q What other files did you determine did exist?

A Well, I learned that the files -- the casualty files were held at Randolph. That they have computerized intelligence intelligence data at Kelly, nearby. I did see portions of records at JCRC at Thailand -- I don't know how to spell the place where it was at -- but anyway at

JCRC, the joint casualty resolutions center. I learned at a later date that there are files contained at Rosly at the Washington area by the Defense Intelligence Agency. And that there's a number of files at the Pentagon which is supposedly a duplicate of the file at Randolph.

Q All right. And does the State Department maintain files, do you know?

A On my husband?

Q Yes.

A I don't know.

Q How about the CIA, do you know?

A I don't know.

Q Now, you have mentioned these various files. Did you look at all of them?

A No. I have gone to for instance the Defense Intelligence Agency. They explained to me they could not and would not show me the file and explained to me why.

Q Why did they say they would not let you see it?

A Well, there were a number of classified documents involved. That it was -- that they had a certain mandate for what they do. That they are to receive information citing reports , and attempt to correlate this data. Therefore there may be data relative to another case which it is none of my business to see.

Q Now, you have seen some of these files, is that correct?

A Yes I have.

Q Which ones have you seen?

A May I stop a moment.

Remember that there is another set of files too.

Q Go ahead.

A It is called -- I know it is called the 7602 Air Intelligence Group at Fort Belvoir, Virginia.

Q Have you seen that file?

A I have seen portions of it. It was a classified document.

Q Which ones have you seen?

A I have seen portions of the JCRC record. I have seen portions of the record from Fort Belvoir, which is a debriefing document.

I have seen the unclassified records at Randolph Air Force Base. And I have seen the Pentagon duplicate. That is what I have seen.

Q Now, do all of these files that you have seen -- do they all contain the same documents?

A No.

Q In other words, some contain documents which are not in other files? Is that correct?

A Yes, that is correct.

Q And do they all contain the same information, or is there conflicting information between the files?

A There is conflicting information.

Q No, were you ever given a copy of the file which supposedly is to be used in a status review?

A Yes. This past Summer at the National Independence Meeting I reviewed the record. I came in to look at it. I looked at it for a few minutes and discovered that it is very lengtyhy, in two volumes, extremely complex. And there were numerous highly technical sheets that would take a great deal of time to look over to give you -- well, to discern what they mean. So I asked could I please again have a copy of the record. I will offer to pay for this. And to my surprise I was told yes.

Shortly thereafter I received, somewhere in the first part of August or maybe a little later.

Q Does this contain all of the information that you saw in the other files --

THE COURT: Excuse me. This is August of what year?

THE WITNESS: This year.

A No.

Q So it does not contain all of the information?

A No, no.

Q Now, Mrs. Bosiljevac I want you to direct your attention -- I want to direct your attention to August of this year.

A Yes.

Q Did you receive notification from the Department of the Air Force concerning status reviews?

A Yes I did.

Q Did you receive a letter from them at that time?

A Yes I did.

MR. BRADLEY: I will give a copy to the United States Attorney.

I ask that the original be marked in evidence as Plaintiff's Exhibit 8.

THE CLERK: Plaintiff's Exhibit 8 marked in evidence.

(Document referred to being first marked Plaintiff's Exhibit 8 in evidence was received in evidence.)

THE COURT: You have been receiving allowances now at this time?

THE WITNESS: Yes, allotment of my husband's pay.

THE COURT: All right, continue.

Q Now, I show you a copy of Plaintiff's Exhibit 8. What is that?

A All right, this is a letter telling me that the decision has been made to resume status reviews on those missing in action or prisoners of war, and attached to it was I believe it is a press statement that was given at the time the announcement was made.

Q Subsequently did you make a telephone call?

A Yes I did.

Q And to whom did you telephone?

A Well, I called the Air Force Casualty Office -- Well, in fact I called Major Brom at the number that they listed on this.

Q On the letter of August 16th?

A Yes.

Q And what did you say to him and what did he say to you?

A Well, a number of things. I was wondering, since I know a little bit about what goes on, I asked was a summary of circumstances in my husband's case. And I asked when and where and why did they get these together.

And he said, "Well, they don't normally prepare them until the review is ready to be reviewed."

And he said that he would look into it for me and find out if there was one in the file.

I suppose I asked him a number of other questions. Normally I do.

Q Subsequently did you receive a letter from Major Brom?

A Yes.

MR. BRADLEY: I hand a copy to the Assistant United States Attorney. And I offer this as Plaintiff's Exhibit 9.

THE CLERK: Plaintiff's Exhibit 9 marked in evidence.

(Document referred to was received and marked Plaintiff's Exhibit 9 in evidence.)

(Document handed to Court.)

Q Now, Mrs. Bosiljevac, I hand you a copy of Plaintiff's Exhibit 9. What is that?

(Continued on next page.)

Q Now, Mrs. Bosiljevac, I hand you a copy of plaintiff's exhibit 9. What's that?

A Oh, it says, "Attached is copy of the summary of facts and circumstances you requested in our conversation of 18 August, 1977."

This is from Major Brom.

Q Is there a summary attached?

A Yes, there is.

Q Is this the same summary used throughout the review, the status review?

A Do you mean the status review of 1973?

Q No, in '77?

A I beg your pardon.

Q You asked Major Brom to send you a summary, is that correct?

A Yes.

Q This is the summary to my knowledge of the circumstances -- the facts and circumstances, the official one, that would be used in a status change hearing.

Q It is in any event, the one they sent you as a response to request for the official summary, is that correct?

A Certainly.

Q And a few days later did you receive another letter from the Department of the Air Force?

A Probably.

MR. BRADLEY: I will hand a copy of it to the Assistant U.S. Attorney (Handing).

Q Do you recall receiving another letter on the same subject?

"Well, mark it.

"Answer: I am sorry, I can't remember each one. There are so many letters.

"Mark it in evidence."

MR. BRADLEY: I am sorry, exhibit 10.

THE CLERK: Plaintiff's exhibit 10 marked in evidence.

(Document referred to was received and marked Plaintiff's exhibit 10 in evidence.)

THE COURT: Proceed.

Q I just want to ask you a couple of questions before I ask you about that letter.

You live in Omaha, Nebraska, is that correct?

A Yes, I do.

Q When did you come to New York City?

A Saturday.

Q Saturday. And did something happen Saturday night?

A Yes, -- well, I got sick.

Q Did you have to go to the hospital?

A Yes.

Q Did you have to receive medication?

A Yes.

THE COURT: Are you feeling all right now?

THE WITNESS: Not really, but that's all right.

THE COURT: Would you like to take a break?

THE WITNESS: No, no.

It is just I am supposed to drink eight glasses of water a day. That is why I am asking for the water.

THE COURT: If you need any more water let us know, or if you want to take a break, let us know.

THE WITNESS: Thank you.

Q I show you plaintiff's exhibit 10. Do you recall receiving that letter?

A Yes. It's -- this is a form letter that I think was sent to everybody as was the letter of August 16th. This is a letter explaining to me how a review hearing would be handled. It discusses certain rights of waiver -- of waiver of hearing. It tells me how to waive if I needed to. And it just explains what will happen.

Q Now, Mrs. Bosiljevac, I want to direct your attention to the first page of this letter, the third paragraph.

A Ok.

Q And starting at the second sentence, would you read the rest of the paragraph?

A It says, "Summary of facts and circumstances which will be a consolidation of all available information pertaining to the member which will be prepared for each case. This will become a primary source of information for those who will later determine whether a member is in a proper status..."

Q Does it say in there this will become the primary source?

A Yes. It says, "This will become the primary source of information."

Q Oh, after you received this summary of facts and circumstances, naturally you read it, is that correct?

A Yes.

Q And you previously testified that you made a personal investigation relating to some of the facts concerning your husband's shoot-down and the subsequent events that happened, is that right?

A Yes, I travelled to southeast asia twice and visited the military branches there. I went to Paris once. And made numerous other trips to the Pentagon and to other areas to seek information.

Q Now, based on what you learned as a result of this investigation, would you say that the "Summary of facts and circumstances" is accurate?

A No, I would not.

Q Now, you have also gone through the file that they gave you, is that correct?

A Yes, I read the summary--I read the file when I received it -- I read the summary when I received it. And I tried to read them both together to see if it is correct.

Q Would you say the summary is an accurate summary of what is in the file?

A No.

Q Now, the file itself that internally consistent or does it have conflicting material?

A Conflicting material is in it. It does have conflicting material.

Q Is the file all in readily accessible order, would you say?

A I wouldn't say so.

Q What is wrong with it?

A Well, the ones I received, a bad copy, there are -- well, it is supposedly -- it is in chronological order according to dates, and as the document actually was referring to me -- it is very hard to explain -- what they have done is that documents are held classified for a period of time.

And when it is declassified there is a declassification sheet in it, whatever that is, and the document is then placed back in chronological order where it would have been all the time,--should have been all the time.

Q Is it easy to relate back and forth?

A Not at all because the documents for instance do not have any series of numbers. And the dates are in a particular form where you really have to know a great deal of reading this type of information to easily read the file.

Q Do you have the file in court with you?

A Yes.

Q May we have it?

A It is part one and part two.

Q Is this the file?

A Yes, that is what I received.

MR. BRADLEY: I do not really want to put the entire file in evidence. I do not see any point of belaboring it. I just want to show the size of the whole thing.

THE COURT: Do you want it in evidence? You can mark it.

MR. BRADLEY: We can mark it for identification.

THE COURT: You do not want to put it into evidence? You can mark it in evidence.

THE WITNESS: If you will take it can I have it back because it took me a long time to get it.

THE COURT: All right, mark it.

THE CLERK: Plaintiff's Exhibit 11 marked in evidence.

MR. BRADLEY: 11A and B, I guess.

THE CLERK: 11A and B in evidence.

(Document referred to, being in two parts was received and marked Plaintiff's Exhibit 11A and 11B respectively in evidence.)

THE WITNESS: The only difference about the file is I put black covers on it so it would not fall apart.

THE COURT: All right, proceed.

Q Is all of this file relevant to the determination as to whether yourhusband is now alive or not?

A No, sir, it is not. There is a great deal of extraneous material -- volumes of extraneous material on that record. It is too included for instance aclipping of a garage sale that we had in Omaha, Nebraska and a subsequent investigation to find out whose property the garage sale was held on.

And there are numerous clips of newspaper articles. All kinds of things. There are a lot of things in there that do not in any way pertain to my husband's summary status or his casualty status.

Q And is there approximately 40 pages of instructions ---

A Yes.

Q Those are pages 43 to 82?

A I believe so.

Q Now, you made this personal investigation and you testified that it was an extensive investigation, is that correct?

A I would say that it is.

Q Why did you start to make such an investigation?

A Well, honestly Mike was shot down in 1972. And very shortly thereafter some of his friends and his mother's friends contacted me and said that they had seen an article in the Dayton, Ohio newspaper indicating that the North Vietnamese had captured him on that day.

And I began -- I called and asked them to give me a copy of microfilm, I told the newspaper.

Then I found that the New York Times also carried an article on this which referred to a Hanoi report of capture.

Q Sticking with Dayton for a moment, did you keep a copy of the Dayton article?

A I am sorry?

Q Did you keep a copy of the Dayton article?

A Yes.

It is an awful copy. They put it on some kind of silver and brown paper, but it is the same. It is identical to the New York Times article. This is why I inserted that.

Q Do you have a typewritten version of the Dayton article?

A I just ran through it.

If you turn it around -- whatyou have is what they sent me much later.

Q From the newspaper?

A No, from the military.

Q From the military?

The military sent you this?

A What this is, to be sure there is no confusion-- I received articles. I asked questions about is there a point where I can intercept this to have it explained to me. This is the way the military had it. I said is there a way I can trace after my husband?

They said yes, there is one. They read it. In no way is it the same one at all. It is not at all like it. This is an aircraft which was struck and one pilot ejected with much propaganda. The one I was talked about was monitored by the B.B.C. I can't recall where it was. I think it was Hong Kong I asked them about this. They said they had no knowledge of it at that time. They still couldn't find it. It was not around.

I asked them why was it in the New York Times and the Dayton Ohio News, other people had it and they didn't?

So at that time I offered to send to them, which I did. I sent the copy of the article to them.

Very shortly thereafter I was sent a copy of it which did correspond.

Q Is this the New York Times article I have here?

A If you turn it around --

(Mr. Bradley indicates).

A (Continuing) -- yes, it is.

MR. BRADLEY: I show a copy to the Assistant U.S. Attorney.

I would ask that it be marked for evidence as the next exhibit number.

THE CLERK: Plaintiff's exhibit 12 marked in evidence.

(Document referred to was received and marked plaintiff's exhibit 12 in evidence.)

(Document handed to Court.)

THE COURT: Yes, go ahead.

Q I show you the exhibit.

A Yes, this is the New York Times article that was printed on 30 September, 72.

Q Which is one day after your husband was shot down,is that correct?

A Yes.

Q Now, you see there is a map there on the article-- in the article?

A Yes.

Q I want to direct your attention to the text 3 lines below that map, the paragraph that begins there. Would you read that paragraph please?

A Ok, it says, "Hanoi radio said that two United States Jets were downed over North Vietnam on Friday, and that the pilots had been captured."

Q Subsequently to learning of that article you then started your investigation, is that correct?

A Well, yes, when I was told it didn't exist and as soon as I sent the article then it did exist, yes, I did.

Q And what was this that it didn't exist and it did exist?

A Well, that -- I had asked the Casualty Branch did they have a foreign broadcast intercept that corresponded to this New York Times article and the Dayton, Ohio article. They said at that time they did not. So I offered it to them. I sent it to them. Then afterwards they said, "Well, we have it and it is being added to the record."

There was a great deal of discussion between myself and the officers at the time about this.

Q Which officer was this?

A I really can't remember. There have been so many people in that Casualty Branch. I believe it is John Wenig, because it was during that period of time.

Q And on or about August 23, 1973, did they send you a letter with the Foreign Broadcast intercepted reports?

That was returning the articles to me.

I show you a letter -- I first show it to the Assistant U.S. Attorney -- and ask that it be marked in evidence as exhibit 13.

THE CLERK: Plaintiff's exhibit 13 marked in evidence.

(Document referred to was received and marked plaintiff's exhibit 13 in evidence.)

THE COURT: Yes.

Q I show you plaintiff's exhibit 13.

A Yes, this is the letter from, well, Gary L. Rosevold, Captain, Air Force.

Q Now, there are some attachments to this. What are the attachments?

A Well, four attachments --

Q What is BBIS?

A BBIS is British Broadcast Information Service.

Q BBIS is the nickname for it, is that correct?

A Yes. What it is is that they sent me a copy of the broadcast that was picked up by someone.

And this is dated 30th September, 1972.

So it was monitored. It corresponds to the article that was in the New York Times. Now it is, I think, the identical one.

Q I want to direct your attention to the third page of the exhibit. Would you read the first paragraph of the third page of the exhibit?

A It is a terrible copy. It says unclass BBC.

It says Hanoi -- I can't read the numbers. Domestic Service in Vietnamese 113GMT, Greenich meantime, 29 September 72, Text:"According to the latest reports at 1430 on 29th September the Hanoi anti aircraft group maintained high vigilance and fighting well downed two U.S. jets. The aggressor pilots bailed out andwere immediately captured by the local people ---"

(continued next page)

Q So this precipitated your investigation and then you started an investigation and you continued an investigation and subsequently you received this summary facts and circumstances which you received on or about the 20th of August?

MS. BUCK: Objection. Are you testifying or is the witness?

MR. BRADLEY: I'm directing the witness' attention to the summary.

BY MR. BRADLEY:

Q You received the summary facts and circumstances and I want to go through the summary facts and circumstances and determine whether or not it is a hundred percent accurate. Before you get through let me ask you, are you feeling tired, are you in good shape?

A I am fine.

Q Allright. I direct your attention to the first page of this summary of fact and circumstances and I direct your attention to the 7th line.

What is the seventh line, the sentence beginning at approximately 1325.

A Ok.

Q Would you read that sentence, please?

A At approximately 1325, a surface to air missile SAM in paren, damaged the lead aircraft, the lead F105G aircraft.

It became uncontrollable.

Q Did you investigate the circumstances concerning, what happened to that aircraft after the SAM missile exploded?

A Yes, there were a number of my friends who gave me information, who were flying with him at the time. One of them was Captain Bob Peitt had a personal tape recording. In his aircraft known as Crow 02.

Q You mention Crow 02, would you explain what you mean by "Crow 02"?

A When you fly on a mission each aircraft had a name and number and in the flight that my husband was flying he had the lead aircraft. My husband's number was Crow 01 which was another of the same type of aircraft as Crow 02 which was close to him.

Q In other words, it was another plane in thesame flight?

A They were flying in formation.

Q And Captain Peitt was Crow 02?

A Yes, sir.

Q And, you mentimed a personal tape recording, could you tell us the circumstances under which that tape recording was made?

A I don't believe he told me. I think it was another guy who was flying with my husband at the time.

Captain Haines,who was stationed at Arthur Air Force Base. He had just come back from Southeast Asia and he said Bob made a tape of this and you may want to hear it and I said yes, I do.

So we listened to the tape. Captain Peitt said that pilots sometimes willcarry their own tape recorders, like Panasonic tape recorders, with a cassette so that they could listen to the radio calls when they got back to their living quarters and make sure that the signals they were hearing, that their ears were sharp to see if they knew what they were doing, kind of a personal deep thing.

Q And, a tape recorder was in Crow 02?

A Yes,sir.

Q Did you listen to the tape recording?

A Yes, many times.

Q And, what did you learn as a result of listening to the tape recording?

A Well, a number of things. Number one, relatingto the summary facts and circumstances, that there was a surface two airmissile that exploded becauseof the proximity, excuse me the way it has been explained to me, approximately 20 feet behind the aircraft and damaged the aircraft and from the tape you can listen to it and determine how long they stayed in the aircraft which is approximately five minutes. They flew a relatively good distance during that period of time.

Q Now, is it possible to determine from that tape what they were doing in that aircraft during those five minutes?

A I don't think so.

It's not during the entire five minutes because of the radio contact. From the tape, there were calls and the first call on the tape is from Colonel O'Neill the pilot of Crow 2, to say that Crow 1 was hit. Thereafter, there are communications with them, but it also contains other pilots who made radio calls to other aircraft since there are many in the area.

Q But, you can tell that the plane continued to fly for five minutes?

A At least. Possibly longer.

It's very lengthy the tape.

Q Now, to go back to the summary, in fact, going down the same page, you see the line ending with the word "No?"

It's the 10th or 12th line down.

A Yes, sir.

Q Will you read that sentence, please?

A They must be a typographical error. It says that no contact was ever established with Captain Fovisck (Phonetic) and no emergency electronic signals were received

Bosiljevac-direct

from him.

Q As a result of your investigation, did you determine whether or not any emergency signals were received from Captain Fovisc k?

A Yes, sir.

Q And,how did you determine that?

A Well, there were a number of sources. Particularly, and the most,and I think the clearest one was during the debriefing of Colonel O'Neill when he was repatriated from the Military, being debrief in the Philippines by a Colonel Jolva, I don't know how to spell it. Anyway, it was explained to me by Jim that he was shown an intelligence folder and a resume of -- search and rescue report and there was intelligence documents that both had been spoken to on the ground.

Q You mentioned Jim, who is Jim?

A Jim is, I'm awful sorry -- Jim is Lt. Colonel James O'Neill.

Q Referring back once again to the tape, did the tape recording have anything in it concerning the emergency electronic signals?

A Yes, it did.

On the tape recording there were numerous, many aircraft in the area and one of the calls that comes up on the radio frequently is a call to Red Crown. Or somebody referred to as

Bosiljevac-direct

Red Crown.

Q As far as the electronic signals on the tape, does it also have a beep signal?

A Yes, sir.

Q Do you know what a beep signal is?

A Yes, sir.

Q Tell the Judge.

A To my knowledge, a beep signal is that the person in the aircraft has some kind of transmitter on his person so that when he ejects, it makes some noise to the ground or whatever so it can be tanmitted to the rescuing aircraft that are looking for him.

Just simply, it admits a sound and on the tape recording you can hear a wop, wop, noise for a few minutes.

That's the sound that the beeper makes.

It's a round rotating thing.

Q In other words, a man exiting the plane would have his beeper on; is that correct?

A It's just for a few minutes.

As it comes out it's on a few seconds as it comesout.

Q Now, that is used when somebody is ejecting from the aircraft?

A Yes, sir.

Q Did you speak to Captain O'Neill concerning the beeper?

A It's Lt. Colonel.

Yes, I did.

That was because I received a letter earlier indicating they had problems with their beepers.

I asked him if it was so and he said I think so.

(continued next page)

MP/AMG
T5AM/2
1

BY MR. BRADLEY:

Q Right.

Now, this tape recording, do you have a copy of the tape recording?

A Yes.

Q Did you ever send a copy of the recording to Randolph Air Force Base?

A I did not send a copy to Randolph Air Force Base, they contacted Captain Peitt directly and asked him to send a copy.

Q Did he do so?

A I believe so. I never seen anything in the record about it other than a conversation with him.

Q Is the tape recording part of any of the official files you testified you reviewed?

A How do you mean, the tape -- there is reference to the tape.

Q You looked at the files, have you seen the actual paper recording in --

A No, and there is no transcription.

Q No transcription either?

A It would be very difficult, there is some degree of obsenity on it too.

Q You have not seen any such transcript?

A No.

Q When you reviewed your file, did you see a report from Captain Petit concerning the shoot-down?

A (No response.)

Q The shooting down of your husband?

A Yes. There was -- I don't know how recently that would be classified, but there is now in the record -- it was classified for a period of time and it's now part of the record, Captain Petit's witness' statement.

Q Was it in the records the first time? Do you know?

A No, it was classified.

Q It subsequently became declassified?

A Yes, it probably says on the document what date.

MR. BRADLEY: I offer a copy to the Assistant United States Attorney and I ask that it be marked in evidence.

THE CLERK: Plaintiff's 4 marked in evidence.

(Pause.)

THE COURT: Go ahead.

Q I show you a copy of this report.

A That is Bob Petit's statement.

Q I direct your attention to the third paragraph.

A Third paragraph, okay.

Q Would you read that paragraph, please?

A "I did see him. I did see man -- seat separation. I did see a good shoot. I did hear one deeper. Whether in the area where member is down was broken clouds below, type of terrain is hilly, where they were sparsely populated."

Q Going through that file, did you also see a report from one Captain Porter?

A Yes.

Q Who is Captain Porter?

A Captain Porter was the other crew member, the aircraft from which the tape came.

MR. BRADLEY: I show a copy of the report to the Assistant United States Attorney and I ask the report be marked in evidence as plaintiff's Exhibit 15.

THE CLERK: Plaintiff's Exhibit 15 marked in evidence.

(Pause.)

Q Now, I show you plaintiff's Exhibit 15 and I ask you if you will read the third paragraph?

A "I last saw him in the vicinity of 2101/10522. I did see him eject. I did see man seat separation. I did see a good shoot. I did hear a beeper. Whether in the area where member is down was overcast, type of terrain is low hilly and sparsely populated."

Q All right. Going on and continuing with the summary of facts and circumstances, in the question of whether or not the emergency electronic signals were received, you mentioned something called Red Crown?

A Yes.

Q Do you know what Red Crown is?

A To my knowledge it is an intelligence gathering unit of some type, highly sophisticated. It was, at the time that I originally inquired about it, considered a classified matter.

Q Now, you mentioned that Colonel O'Neill said something about Red Crown?

A Yes, he said that when I talked to him on the telephone that he had seen SAR in the resume of documents --

Q What is SAR?

A Search and rescue. He was shown documents and he saw this report that said that both he and my husband Mike had been spoken to on the ground. Red Crown spoke to them.

Q Is there any reference to such conversation anywhere in the facts and circumstances?

A No.

Q Is there any reference to any conversation in the file?

A What do you mean by reference to conversation?

Q Does the file mention the Red Crown overhearing --

A No, it does not mention the report. Nowhere in the summary or the file.

THE COURT: Well, here I have 1600 hours, April, Captain Wenig saying that Colonel O'Neill told you --

THE WITNESS: Yes. They asked me a question about it -- is it a matter of official records or reports. The report is not in there, only inquiry about the report.

THE COURT: Colonel O'Neill apparently told you that the information that people had spoken to your husband was incorrect.

THE WITNESS: He said, when shown the document, that he indicated that since he had not heard the transmission, that he indicated that it was false. I asked -- the reason I asked questions in the file about this was, be the document true or false, I felt it had some bearing on the case and in view of the articles on the garage sale and other things I felt this document should be part of the official record, be it true or false, so that it can be tested for its accuracy.

Q I take it this document is not part of the record?

A Not that I know of. There is much discussion of it.

Q But not the document that --

A No.

THE COURT: Excuse me. I don't want to cut this off. I know the witness suffered a great deal of grief but where are we going?

MR. BRADLEY: We are trying to establish the Air Force through regulations made it clear how they --

THE COURT: Has there been a status view sought?

MR. BRADLEY: No, this is the whole point. The Armed Services announced they are going to conduct the status reviews.

THE COURT: Supposing they do hold a status review, are you going to demand to be heard?

THE WITNESS: Yes.

THE COURT: What evidence are you going to show other than the evidence in the files?

THE WITNESS: That is a problem. I don't know what I can -- I am required to show.

THE COURT: Do you have anything?

THE WITNESS: There are a number of things that happened.

THE COURT: Like what?

THE WITNESS: For instance, on the Red Crown report there was never -- the document was never produced.

THE COURT: Let's assume your husband landed and was alive?

THE WITNESS: Yes.

THE COURT: He was never seen thereafter as far as anybody knows.

THE WITNESS: Well, that's not quite true.

THE COURT: What evidence do you have that he was seen?

MR. FOLEY: Your Honor --

THE COURT: Excuse me, I would like to hear from the witness.

THE WITNESS: I will explain. I am trying to get the time frame in my mind correct. One of the things that happened during a trip I made to Southeast Asia in '73 I was told by a military member who had spent many years in Intelligence that my husband's name appeared on a list of men who were enroute to another country. And I've never found anything in the record on that.

THE COURT: Is there anything in the record, classified or unclassified, on that? I am addressing the Government.

MS. BUCK: I have a file and I have not gone through the file --

THE COURT: Who has?

MS. BUCK: The officer is present in the courtroom.

THE COURT: Come forward, please.

What is your name?

A VOICE: Colonel Archie Gratch.

THE COURT: Have you gone through the material classified and unclassified?

COLONEL GRATCH: Yes, Sir.

THE COURT: Is there anything in the classified or unclassified material indicating this man went to another country?

COLONEL GRATCH: No, Sir. The question has been raised and we researched it and were not able to ever come up with any information to substantiate this at all.

THE COURT: Is there any reason why the Government would want to hold this information back?

COLONEL GRATCH: Absolutely not. We are just as interested in trying to find out what happened to the individual as the family is.

THE COURT: What else do you have?

THE WITNESS: I have the essential data that my husband was shot down, he ejected safely from the aircraft, made it to the ground safely, and presumably was alive. To my knowledge, no evidence that he died.

THE COURT: You haven't heard --

THE WITNESS: You must understand, in many cases, and Commander Voder is in the room, many, many men were held for years without any kind of communication and there has never been an accounting. They consistently refused to have an accounting.

THE COURT: What evidence do you have --

THE WITNESS: That he is currently alive? I can't prove that.

THE COURT: Why would they want to hold your husband?

THE WITNESS: My husband --

THE COURT: And let everybody else go.

THE WITNESS: I can't prove why. I can speculate. He was trained in -- I don't know, I don't think it is fair to speculate. Why would they want to? There are a number of political reasons. Overall, the Vietnamese demanded three-quarters -- a very large amount, and there has never been an accouting --

MR. BRADLEY: We did expect to have evidence --

THE COURT: Excuse me.

MR. BRADLEY: The thrust of the case -- we can't prove he is alive -- the thrust of our case is the Government has a set of facts, these facts when supplemented with material which is not in the summary of facts and circumstances indicate, (a), he made it out of the plane safely, (b), made it to the ground safely, (c), he was held alive and well in a prison camp.

THE COURT: No. I am sorry. I must say, and I know this is very painful to you --

MR. BRADLEY: What we are also --

THE COURT: Excuse me. On the record before us there is an indication that he was ejected from the plane. He was alive apparently when he ejected. At least there is substantial probability.

THE WITNESS: I don't mean to interrupt, but a North Vietnamese guard told Colonel O'Neill my husband was alive.

THE COURT: It was never substantiated by anybody ever seeing him? The condition of his being seen coming down and lack of further indication suggests it's probably he was dead before he hit the ground. If he was alive when he hit the ground, which is improbable, there is a substantial probability he was killed or died from his wounds, and if he didn't die from his wounds there is a substantial probability he died in captivity. The chances of him being alive, based on the evidence we have, and giving every speculation, is so remote based on this record that at any hearing of any kind he would have to be declared dead.

(Continued on next page.)

SSsf
6am/1

Bosiljevac-direct

MR. BRADLEY: One of the important things, you said based on this record -- one of the things which we haven't quite gotten to yet is the Defense Intelligence Agency's supposedly going through its records, classified documents, and it's beginning to declassify them and turn some of them over --

THE COURT: They'll do everything for her. She'll have all of this at the hearing and she can argue it.

MR. BRADLEY: That is the question. Will she have it all at the hearing? They have indicated very clearly they will not make it available.

THE COURT: She's going to present all of this.

THE WITNESS: Sir, I really strongly feel you don't understand what's happening.

THE COURT: Try to explain it to me.

THE WITNESS: Unless --

THE COURT: Go ahead.

THE WITNESS: In my husband's case, I clearly understand he is a mortal being and there's a number of things the Vietnamese could have done. We're not arguing whether he's alive or dead at this time.

THE COURT: We have to argue on the probability. If this was a court of law --

THE WITNESS: We're not judging if my husband is dead or alive, are we?

THE COURT: If this is a court of law, on all the evidence that is available, all the assumptions or inferences giving you every benefit the Court would have to declare him dead.

THE WITNESS: We haven't discussed much of the information that indicates there is further information.

THE COURT: Like what else I'm asking,do you have?

THE WITNESS: Like I said there was the report on the ground, that's never been made clear. I would like very much the opportunity at a hearing to find out what Colonel O'Neil --

THE COURT: Have you spoken to him?

THE WITNESS: I talked to him on the phone.

THE COURT: What did he tell you? Why would he want to hide anything?

THE WITNESS: It wouldn't be him. It's not his document to begin with.

THE COURT: I'm sure he's told you everything he knows.

THE WITNESS: I'm sure he has.

THE COURT: Who would want to hide anything?

THE WITNESS: He's also said the Vietnamese guard who indicated that my husband was alive while uninjured and luckier than him he felt was telling the truth.

THE COURT: I understand that.

THE WITNESS: Very strongly he felt that.

THE COURT: He hasn't been returned.

THE WITNESS: Is that an original reason to assume he's dead?

THE COURT: Under all these circumstances it can't be said he's alive on this evidence. Unless you have something additional, I don't see what it is that you're complaining about the Government, what it's doing.

THE WITNESS: It seems to me -- that is not all the records. I can't even -- if there is a sighting report it's been told to us at many meetings we've been at there have been hundreds of live sightings of American POW at a later date after the repatriation of the other men.

If those -- those are somebody, whoever they may be. My husband was shot down at the end of the war. It is important to me that all of the information available be available to me. If I'm going to have to go in and the burden of proof is upon me --

THE COURT: Without respect to burden of proof, it seems to me the probabilities are overwhelmingly in favor of death. I'm sure there's remote possibility your husband is alive. I hope for all our sakes that he is.

It's like these Japanese that were found later, there's one out of a million that survived in the Philippines, but the Vietnamese situations is entirely different.

THE WITNESS: I thing not, sir.

THE COURT: It's possible your husband is alive, but it's remote.

THE WITNESS: There were men for many, many years held by the Vietnamese, either listed or any acknowledgement that they were alive. There is ample motivation in point of view for them withholding American prisoners of war.

THE COURT: To hold people alive?

THE WITNESS: They most certainly did this with the French. It took in excess of 20 years to receive their last prisoner release.

MR. BRADLEY: This point is brought up, in addition to being a qualified pilot, Captain Bosilyevac is a qualified physicist. If anybody had any reason to hold a prisoner, they would have reason to hold him.

THE COURT: I understand he's a very valuable person.

MR. BRADLEY: I would like to show this photograph. The witness has seen this photograph. This appeared in a book about POW and the photograph was brought to her attention by the cousin of Captain Bosilyevac. It contains a variety of photos of POW --

MS. BUCK: I have to object --

MR. BRADLEY: In the background here is one -- we don't know who it is, but it looks like him. What would seem to be important, since these were identified by the military, with which attached names to all the people in this photograph, the name which is attached here is Captain Herring, the witness is being contacted with Captain Herring. He says this is not him, he was not in the photograph.

Therefore we know this is a misidentification. We would like to be able to be in a position to communicate with all of these people. Unfortunately, the only way with communicating people is to write to the Government which is the locator service at Randolph Air Force Base which notifies the person and says, you do not have to reply. These men are presumably still on active service.

When the Government says here is a letter from somebody, you do not have to reply. unquote, it seems to me this indicates that you should not reply. In any case --

THE COURT: I don't believe so. There's no point in trying this case as if the Government were an ogre. It's a very painful situation, but it just is inconceivable, having served myself, that anybody who survived is going to make it difficult for a widow to have a brother officer or a person who is missing in action, a relative of somebody to make it difficult.

MR. BRADLEY: I, too, have suffered. I would suggest it is possible for a person to obtain a mental set, to arrive at the conclusion, these people are dead, therefore the MIA wives are making a

7

nuisance of themselves.

What we're asking for is also provided by the Government, is a possibility of a certain amount of discovery. It doesn't have to be elaborate. There are documents including --

THE COURT: You've gotten this entire file of this material --

MR. BRADLEY: Those are selected. Why cannot we, as their representatives, their advocates, take a look at the documents which have not been made available to us. It seems to me there are those documents. There classified for what reason --

(Continued on next page.)

SS/ed
6AM-2

DIRECT EXAMINATION

BY MR. BRADLEY: (Continued)

THE COURT: What documents? What are you talking about with respect to this particular officer?

MR. BRADLEY: DIA file.

MR. FOLEY: Just became available now. Might I be heard for a moment, your Honor?

THE COURT: You have it?

MR. BRADLEY: No.

THE COURT: What is in the DIA file?

MS. BUCK: The DIA file, from my understanding of it is it's a classified, highly secretive file, the reason not as contents per se, but the source of the information and the method of collection.

THE COURT: What does it say about this man?

MS. BUCK: Whatever information bears on the individual cases either declassified, the original document, with the source and method deleted or extrapolated. That file is not available.

THE COURT: Is there anything in it with respect to this man?

THE WITNESS: You said you haven't seen it.

THE COURT: I understand you haven't seen it. You can't see all secret documents.

Bosiljevac-direct

MR. FOLEY: Nobody has seen it in this courtroom, Judge.

MS. BUCK We have files here. I will make them available to you.

THE COURT: Have you looked at them?

MS. BUCK: I don't have clearance to look at them.

THE WITNESS: I have a need to know.

MS. BUCK: You can look at the DIA file.

THE COURT: How big is the DIA file?

MS. BUCK: It's voluminous. Sometimes a report will come in. Maybe it could pertain to anyone of 200 men.

THE COURT: Who looked at it? I'm not going through all the secret files I don't want to know about it myself. Who has looked through it?

CAPTAIN VOHDEN: I looked through the file.

THE COURT: Is there anything on this lady's husband?

CAPTAIN VOHDEN: Everything in the DIA file has been provided to Mrs. Bosilyevac except the methods of obtaining this information, and that is it. The substance of everything conerning her husband she has. The same way J.C.R.C., the airforce folder. There is the same information in all of these, but because of different requirements, she has the substance of everything the U.S. Government has.

THE WITNESS: Can I say something about that?

MR. FOLEY: I wish you wouldn't.

THE WITNESS: Okay -- it's very important.

MR. FOLEY: Go ahead.

THE WITNES: Sorry, your Honor. He mentioned the 7602nd intelligence group files. There's a summary of my husband's pilot debriefing in the file. Since I've recently saw the documents, I was reading through them and only have it in front of me, but where they're questioning Jim O'Neill at the Airforce base and the debriefer was asking him the questions, he said to him, "And then after the gunshot wound, you saw Mike in the chute." I called the only logical place. This document was a summary prepared by the 7602nd intelligence group. I call Randolph Airforce Base, which is our point of contact, if I have question to contact them, as Captain Kovilisky if he would inquire into the validity since there was never any statement about my husband being injured prior to this, and he said "Okay, I'm calling Jim O'Neill." I asked him, "Please don't do that. It

4

Bosiljevac-direct

would be more logical to contact the people who have summarized this tape, the document. Why don't you ask them if they would run the tape to see if it's correct?" They did and a couple of days later Captain Dovilisky called me and said the words, "Gunshot wound should have been the words 'bail out.'" I think that's very, very important since it's a summary of the documents.

THE COURT: Why?

THE WITNESS: I will never know if the information is correct.

THE COURT: Why don't you ask O'Neill? What does O'Neill say?

THE WITNESS: Ask O'Neill?

THE COURT: What does O'Neill say?

THE WITNESS: He said bailed out all right.

THE COURT: I don't understand what hearsay subsequently is going to do --

THE WITNESS: The initial record, as I said, is incorrect.

THE COURT: They have O'Neill's testimony in here, --

THE WITNESS: O'Neill's testimony that their transcription of his testimony contained a very serious error that I just found --

THE COURT: Excuse me, as I understand it, O'Neill now says, and has said, so far as we know that they bailed out. He saw your husband chute. There was an apparent manual deployment of the chuting and indicating your husband was alive at the time of the bailout. He saw your husband's head hanging down, passively, and that was the end of it.

THE WITNESS: Might I bring out something? I don't want to degenerate it into any kind of discussion, but Colonel O'Neill was by his own testimony, 1,000 feet above, a quarter of a mile away from my husband. It's difficult to see. You could see some things.

THE COURT: I understand all that.

THE WITNESS: Since you brought it up that he was laying or hanging passively in the chute, it's common and accepted in training procedure for a man to relax in the chute and to watch the ground until the horizon comes up.

THE COURT: I assume all of that. Assuming he landed, where does that get us? That was 4 years ago.

THE WITNESS: The official record as it stood as of 3 weeks ago said and -- after the gunshot wound and you saw Mike in the chute. I'm saying this is a document I'm given to work from to go to a hearing.

I cannot see the original document.

THE COURT: Excuse me --

THE WITNESS: I can find records --

THE COURT: I'm sure you can. I can assure you I've tried hundreds and thousands of cases. There isn't a case of any substance that you can't go through the record and find all kind of discrepancies. The discrepancies in this file are relatively minor of that type. I assure you of that --

THE WITNESS: Have you seen the classified files?

THE COURT: I assume what this captain is telling me is the truth on that point. There is no reason for him to lie to me about it. Let's be realistic.

THE WITNESS: How can you know all the intricacies of the file?

THE COURT: I'm not going to some conspiracy on the part of the Government to hide the fact that they know your husband is alive. I would have to assume some good faith.

THE WITNESS: I have never considered them conspiring against my husband. I've only asked that the facts involved be accurately portrayed for the record.

THE COURT: Let me get to a more fundamental point. I would like to let this lady go on. She's obviously a very intelligent, dedicated woman who has done a great deal in this case, but I must say I don't understand the relevance of all of this because the only question before me is with respect to MIAs who are not otherwise going to have an opportunity at a hearing. This lady represented her husband's interests extremely well.

MR. FOLEY: Can I be heard on that?

THE COURT: As far as I can tell on the basis of the record before me, the hearing will be conducted in accordance with the DcDonald requirements. That doesn't mean this is what I would do before a jury, but that's not before me.

THE WITNESS: Can I mention something to you you're not aware of?

THE COURT: Yes.

THE WITNESS: In the announcement from the Defense Department regarding the presumption of these deaths, it was stated clarly, again, as it was previously that all of the men will be declared dead.

THE COURT: I don't credit --

THE WITNESS: It's as if I'm walking into a hearing that I know he will be declared dead.

THE COURT: I don't consider that a foregone conclusion. I believe based on the information we have that they're going to consider this based on the evidence.

Why are we having this witness here at all?

MR. FOLEY: Might I be heard?

THE COURT: Yes.

MR. FOLEY: The testimony of this witness so far represents an attempt to put into the record in an orderly way evidence which will show that from the very beginning there is a record of inadequacy in the file that was maintained of her husband.

THE COURT: I don't read the file that way.

MR. FOLEY: By the time we get through --

THE COURT: Quite the contrary, I read the information supplied in connection with this case as indicating a painstaking attempt to gather the information necessary for these determinations.

MR. FOLEY: What you read, first of all, is a 1973 file which is not the one in front of you, they concluded that he was dead and did not go through with it. That file was wrong, the material put in since then was excluded. We know right now it's a piecemeal operation, bit by bit things are added. That's the testimony.

THE COURT: That's the nature of life.

MR. FOLEY: All we're saying before people draw conclusions on the fight, let's get the bits in there. It's a simple thing.

THE COURT: Excuse me, I'm not going to, on the basis of the information before me rule that this lady is going to have an inadequate or unfair hearing. On the contrary, everything done to date indicates that she will have an adequate hearing.

In addition to that, she has a Court of Claims procedure subsequent --

MR. FOLEY: No she doesn't.

THE COURT: That's the way I read it.

MR. FOLEY: That she can go after.

THE COURT: The Krone case. I don't see how this is helping us. I know it's painful, but you understand I have to get into this problem.

I don't know if your husband is alive or dead. That's not for me to determine.

THE WITNESS: Sir, you assume he is.

THE COURT: I hope he is, but all I can do is say that I can't see on this record how the Government has failed to do what it should do.

MR. FOLEY: All I can do is ask you if you will permit us to put in a record that I believe will demonstrate to you that the record making, keeping and utilization procedures, which is determine matters of life and death for these men, are inadequate.

THE COURT: Excuse me, it is not determining matters of life and death for these people. It's wrong for you to say that. It's determining whether an adjudication is to be made in a certain way. The Government isn't killing anybody.

MR. FOLEY: I didn't say killing---

THE COURT: These are what you infer. The Government and every member of the armed forces, up and down, I'm sure hopes this man is alive and will do everything possible to bring him back alive.

MR. FOLEY: I have never said or intended to indicate I accuse the Government --

THE COURT: We have to take a break for lunch. We'll commence at 2:00 o'clock. I must say, again, and I don't say this in derogation of all the fine work you have done, it just doesn't help me in this case to have this.

MR. FOLEY: We're trying to get someplace.

THE COURT: We're talking now about a case brought on be half of people -- there is nobody representing the interest of the MIA.

THE WITNESS: I cannot adequately represent my husband without the complete records. I don't care about their sources. I do not care about their methods of obtaining the information. I care about adequate and fair hearing.

THE COURT: I understand. I just don't believe they're holding anything back on the basis of this record.

THE WITNESS: I do. It can be shown there is serious doubt.

MR. FOLEY: Maybe one way to look at it is this. Aren't we all speculating? There's only one way to know, let's look at the whole thing and find out.

THE COURT: I'm not going to go through the records --

MR. FOLEY: I'm not asking you to look at the whole thing. If this procedure of these reports were used, was conducted in a manner the families had a fair opportunity to go ahead, not taking the piecemeal things over the years --

THE COURT: I don't understand what you're complaining about. At the time of the hearing, all the data gathered to date will be presented.

MR. FOLEY: Our position is that it is not, that there's material not presented. That's what we're getting to.

THE COURT: In this case there's no indication of anything --

MR. FOLEY: We're not through testifying. I hope we will have you convinced.

THE COURT: Get to the heart of it. I just don't see it.

THE WITNESS: It's very difficult.

THE COURT: It's painful for all of the people. I really regret this, Madam. I know how difficult it is for you.

THE WITNESS: I understand people gather or make decisions, or decide that people are dead based upon that, we just don't know what happened to them, that it's very easy to do. I would prefer that if a decision like this is made, that it be based with all the cards showing.

THE COURT: There's no indication they're holding anything back.

THE WITNESS: I received a letter 2 weeks ago from the Defense Intelligence Agency there are numerous reports relating to my husband's case that will for the moment, they can't show to me, but they will be sometime in the future.

MR. FOLEY: That was going to be put in as an exhibit.

THE COURT: I'll hear you.

THE WITNESS: Please.

MR. FOLEY: All I can say, Judge, is that there's no question about one thing and that is that were it not for MacDonald and a couple of more things going on over the years, everything that is now out of the record or was out of the record 6 months or a year ago, would have been out of it in 1973 when they tried to declare him dead before. All I can say is that without looking we don't know. We won't know and we won't know where we stand. I think that's a fairly simple statement. There are people who come into court and make all sorts of conjectures and you've referred to it. The fact of the matter is, though, that I think our society regards this as a civilized thing to let both sides take a look and put in their best. This lady is not able to do that.

THE COURT: I don't see that. You haven't established --

MR. FOLEY: We're not there yet. By the time the testimony os over of this witness and the next witness, you're going to realize something. In addition to that we will have another point to cover and the typicality of these cases, how typical it is. It is important and true.

THE COURT: I'll hear you. We may have to continue this because I have other cases.

MR. FOLEY: We'll work it out with you, Judge, any way you want.

THE COURT: I would like to finish this witness today so she can go home.

MR. FOLEY: Yes.

THE COURT: I have to break about 3:30.

MR. FOLEY: There's something I think we should discuss before you take a break. It was indicated by the assistant U.S. Attorney there are some witnesses by the Government who may have a need to travel. I would like to make an offer anything done to break the normal course, the normal form of putting one on after another, let these men in early, that would be perfectly agreeable with me.

THE COURT: I don't want to see half of our armed forces sitting around in the courtroom.

MS. BUCK: We're grateful to Mr. Foley for his offer.

THE COURT: The same thing is true of these other witnesses. I'm sure they have their children and other things to take care of.

MS. BUCK: We would ask Mr. Seevers be put on next. He is heading a delegation to Vietnam.

MR. FOLEY: No problem with that at all.

THE COURT: If I can take him. I have the same problem. I have to leave at a quarter to four. I'll hold a night session, come back at 8:00 o'clock and sit late. There's a limit to what we have. I have a jury case pending. I have criminal matters.

MR. FOLEY: Why don't we go off the record?

THE COURT: All right, off the record.

(Discussion off the record.)

(Luncheon recess.)

SS/ed
LPM-1

AFTERNOON SESSION

MARY KATHLEEN VEYS BOSILJEVAC, having been previously sworn, resumed the witness stand, and testified further as follows:

THE COURT: Continue, please.

DIRECT EXAMINATION

BY MR. BRADLEY: (Continued)

THE COURT: The Government can substitute the witness's copy, 11-A and B so she can take it home. I know these are precious documents.

MR. FOLEY: Before I get on the record, I struck out tonight about being here tonight. I have people coming from out of town that cannot attend. Both of us are involved with something. I tried to see if I can stop them from coming in. I tried to cooperate. We have to hold court on another matter the people are coming in on.

MS. BUCK: Mr. Seevers from the State Department --

THE COURT: Please come forward, please. When are you leaving for Vietnam?

MR. SEEVERS: We're due in Hanoi on the 30th of September. We're in the process of making arrangements with the Vienamese. I need to be back in Washington for that purpose.

THE COURT: Can't we take his testimony by telephone?

MR. FOLEY: I don't see why not.

MR. SEIVERTS: There's no chance we can do it this afternoon?

MR. FOLEY: I would like to cooperate; but it's just not in the cards.

THE COURT: Let's proceed, Gentlemen.

DIRECT EXAMINATION

BY MR. BRADLEY: (Continued)

Q I want to direct your attention to Plaintiff's Exhibit 7, which is the document dated September 24th, 1973. Which document is this, what are we talking about?

A This is the year end review that was conducted September of '73, my husband's case.

Q Before this document was actually issued, did you have a conversation with General Mc'Neill?

A Yes, I did.

Q Who is General McNeill?

A General MacNeill is a Major General, U.S. Airforce, Assistant DCS, persons for military personnel, something like that.

Q Do you recall where you had this conversation?

A Yes, Randolph Airforce Base in his office.

Q Do you recall when you had it?

Bosiljevac-direct

A July 20th, 1973.

Q Immediately prior to the conversation, where --

A I had been upstairs in the casualty section reviewing my husband's file.

Q Were you talking to anybody there?

A Yes, Colonel J. G. Luther and Captain Wining was there, and M. E. Cosa, Colonel U.S. Airforce. I think he's their legal officer, was at that time.

Q Does General MacNeill have any relationship to those gentlemen?

A He's their superior officer, I understand.

Q Tell us about the conversation you had with General MacNeill?

A Myself and Carolyn Stanwick, another MIA wife, had a long day of discussion and review of the records and we had asked for a time to speak with General MacNeill in the afternoon. We were escorted down to the room to see General MacNeill by Colonel Luther. As he came in he told us not to pay any attention to the guys upstairs.

Q Who told you?

A General MacNeill.

Q Continue.

A I said it's very difficult to do. He said, "Well, I am the person who signs a status review, the final signature," in essence. He stated categorically that he had reviewed both Colonel Stanwick's record and Mike Basiljevac's records, my husband, and that he would not recommend for a presumption of death in either case at that time. He further went on to explain that he was leaving for Washington shortly thereafter and that it was to be explained to him what the current policy was because it was very difficult to determine what policy was, but never in writing. They were having trouble with it.

He explained to me that he would not recommend presumption of death except if the word came directly from the Whitehouse and that this conversation occurred July 20th, '73.

Q Does his signature appeal on this document?

A Yes.

Q In recent months, have you had conversations with any military personnel concerning the completeness of your records of the file?

A Yes. Numerous conversations.

Q Has there been any conversations concerning whether or not it's complete, the file that you have is complete?

A I'm trying to remember. I assume, yes, that we've discussed this; that my claim is it is incomplete and information is continually added.

Q Have you had specific conversations with military personnel concerning whether or not it's complete?

A Yes, -- well, conversation of I put in a freedom of information request, and also the Central Intelligence Agency of their records that they contain.

Q Has the military indicated whether or not the file given to you is complete?

A The most recent conversation is what I heard here in this room today, the claim is that the records are complete.

Q Have you heard any such claim made previously?

A Oh, yes. I heard the claim prior to this -- well, the first time I went down to Randolph Airforce Base that the records were complete at that time, in July of '73

Q Who told you the records were complete at that time?

A Colonel Luther.

Q Have you subsequently seen documents in that file that were dated prior to July, 1973 but were not in the file at the time that you had that conversation with Colonel Luther? July of 1973?

A Yes, it was then later declassified.

Q Have there been any subsequent conversations in which any military personnel have told you that the file was complete?

A Yes, I'm positive of that.

Q After the conversations in which they told you the file was complete, did additional documents of earlier dates appear in the file?

A Yes. I can honestly say in '74 and '75 I was being told the file was totally complete and the essence of everything had been given to me, but later the documents when declassified were put into the record.

Q Getting back to this summary that we were discussing sometime ago, the summary of the facts and circumstances which are attached to the letter of August 19th, Plaintiff's Exhibit 9, once again to refresh your recollection, you read the sentence which says no contact was ever established with Captain Bosiljevac and no emergency electronic signals were received from him?

A Yes.

Q I want to ask you whether you know Colonel Banner?

A Yes, with reference to our statement now, it says here in the summary, fact or circumstance, that no beepers were heard. The eye witness's from both Gary Porter and Captain Petit, both state in an officially signed document that beepers were heard. Your other question?

Q You're saying that in the summary --

A Summary conflicts with the actual eye witness's statement.

Q Summary item 9 conflicts with Petit's and Porter's statements?

A And a couple of other guys.

Q Petit's report being Exhibit 14 and Porter's report being Exhibit 15.

Going on to Colonel Banner, are you acquainted with a Colonel Banner?

A Yes, he's now Colonel Banner. He was Major Banner when I originally met him.

Q Does your mother own, or did she ever own a liquor store?

A Yes.

Q Did Colonel Banner ever come to that liquor store , or Major Banner, whatever he was?

A My father's grocery store -- I'll explain what happened. He came into the store and a picture of my husband was up on the wall. He said, "Oh, we know that he was alive on the ground, very likely he will be repatriated." He came home sometime in late December of '73, I believe, so this is prior to the repatriation. Major Banner, when his tour was finished in Southeast Asia, what I'm trying to get out is that this information was brought to us prior to the release of the prisoners.

Q December '73 or '72 that you had this conversation with him?

A Wait a minute. I don't know what you're saying.

Q Which year -- he came home from his tour of duty in December of which year?

A I'm sorry, December of '73 -- there's a letter in there. I don't know which year he came back. I was paying attention to other things. All I know, he came into the liquor store, explained my husband had been on the ground, had worked in a blue chip sight like headquarters for linebacker forces --

Q Taking it slow, what is blue chip?

A Headquarters at that time for linebacker forces.

Q What is linebacker forces?

A Linebacker referred to linebacker one which was the initial -- which were the missions that were being flown at that time.

Q Is it fair to say linebacker is the bombing missions over North Vietnam?

A I think it is.

Q Blue chip is the headquarters of those bombing missions; is that correct?

Bosiljevac-direct

A His explanation to me is that that's where they were bragged, they target the missions and notify the aircraft where to go.

Q Colonel Banner worked there?

A He was there.

Q What exactly did he say that he saw?

A He said the night of the shoot down that he was working late, working on -- again, preparing the documents or whatever it takes to send the tankers north, to North Vietnam to refuel the search and rescue aircraft, that he was working late and that General Cross, his immediate superior, came out of his office and said to him approximately 7:00 o'clock in the evening that they were going to launch tonight's search and rescue and that they worked up the tanker support and that the night search and rescue was launched.

Q Did Colonel Banner say anything further about what General Cross said?

A General Cross said this was based on hard information the men were down, very close to the coast, that they were down close to the coast, is the way he put it to me.

Q Do you know how many planes were shot down that day?

A Yes, there were to aircraft down that day, an F-111 and the F-105 my husband was in.

10 Bosiljevac-direct

Q Was the F-111 ever recovered?

A No.

Q Did Banner ever say what kind of report it was that they received?

A I believe at the time he referred to red crown.

Q Red crown was previously testified to was an intelligent listening information device?

A He said the General had, from whatever sources he used, whatever his channels are, this information which he relayed to Major Banner at the time and said, "Get ready for a night stop."

Q Turning, once again to the summary of facts and circumstances, does the summary of facts and circumstances relate the capture of your husband by the North Vietnamese?

A No, it does not. You mean the report of capture from the North Vietnamese radio?

Q Yes.

A No, not at all. Even though it's my understanding this is considered significant information.

Q Did you ever have a conversation with one Captain Sam Peacock?

A Yes.

Q When did you have such conversation?

A I don't remember what the date was at all. I really don't. I know the nature of the conversation.

Q What was the nature of the conversation?

A The nature of the conversation was Sam was a friend of my husband's, flew in his squadron and when he returned to the base, had been debriefed, and in the process of debriefing, he explained that he was told that the men were captured.

Q Did he say where the information came from?

A He said that he referred to what was called snoopy sources and I subsequently inquired about this to find out if anybody knew anything about it and they said there was no such thing as snoopy sources.

Q Who said there was no such thing?

A The people I talked to at Randolph. They said they would check around. Even after checking around they came back to me and said there was no such thing as snoopy sources.

Q Did you eventually learn any further details concerning snoopy sources?

A Yes, I learned from the record that Colonel Westbrook, who is with the air intelligence group at Fort Belevoire, he indicated to him that snoopy sources had to do with the commander of line backer sources.

Q So there was such a thing as snoopy sources?

A Evidently there was, yes. If you want me to explain what Sam Peacock said, there was a second part to this.

Q I'll ask you about that. Did you have conversations concerning any further conversation relating to Sam Peacock?

A Sam Peacock said after a couple of days he went to Bankok with another officer, stayed at the Chapia (ph) Hotel, which is the American Officer billets, and while there he was told by a high ranking GS officer, I don't know if he's a GS-12 or 10.

Q A high ranking civilian?

A That's right, who was also with a man named James R. Banks, who he identified to the services as being from PACA headquarters.

Q What is PACA?

A Pacific Air -- I don't know what it is.

Q What was the conversation?

A The conversation was that these two gentlemen, James R. Banks and the other man indicated that they were part of the intelligence community and that they wanted them to know that both men had been captured approximately 45 minutes after the shoot down.

(Continued on next page.)

Q Have you spoken with James R. Banks?

A No.

Q What efforts have you made to locate James R. Banks?

A Well, what happened was, he left the Air Force voluntarily. Through Captain Peacock and other people I could corroborate and substantiate, where the man was from and who he was, that the man was part of the intelligence committee, but could not be found.

Q Have you subsequently located James R. Banks?

A I have not spoken to him yet. There is a person named James R. Banks in the Washington area. It is very likely it is the same person.

Q Is there any report concerning those Peacock conversations?

A Yes, there is a report and a statement at the end that it was made clear to Captain Peacock, if he could not provide further information on James R. Banks, that they would consider the investigation closed.

MR.BRADLEY: I handed a copy of the report to the Assistant United States Attorney. I will offer another copy as Plaintiff's Exhibit 16.

THE CLERK: Plaintiff's 16 marked in evidence.

(Document handed to Court.)

THE COURT: Yes, go ahead.

Q I show you a document. Is that the report contained in the file concerning the Peacock conversations?

A Yes, this is at least part of it.

Q Now, you mentioned that they originally denied their sources and subsequently you learned what they were?

A Yes.

Q I would direct your attention to Red Crown. When you first heard about Red Crown, was it identified to you exactly what it was?

A No.

Q What were you told about Red Crown?

A I was told that it was classified. But in talking to the men who were up that day on the mission, they said it was common knowledge, that no one should get excited about it.

Subsequently, after they said it was classified, at a later date I saw an article written by Captain Steve Ritchie in American Fighter Base, classifying Red Crown as an intelligence source.

Q Are there any documents in the file concerning the conversations between Captain O'Neill and a guard?

A Yes, there are numerous documents that reference that. There is a sanitized version of his debriefing, which I did reference before, prepared by the 7602nd Air Intelligence Group, discussing what the guard had said.

Q And is the guard's conversation mentioned in the summary of facts and circumstances?

A Yes, it is. It says: On October 5, 1972, after being taken to Hanoi, O'Neill asked a guard about Captain Bosiljevac. The guard spoke English well and after securing the information elsewhere, advised Colenel O'Neill that Captain Bosiljevac was there.

Q And included in the file, is there the transcript of the debriefing of Captain O'Neill?

A Yes.

MR. BRADLEY: I handed a copy to the Assistant United States Attorney and I ask that a copy be marked as Plaintiff's Exhibit 17.

THE CLERK: Plaintiff's Exhibit 17 marked in evidence.

Q I would like to direct your attention to the the fifth page.

A Yes.

Q Down the lefthand column there are letters marked R D R D.

A Yes .

Q I would direct your attention to the second "D'.

Would you read the material to the right of that?

A Which R D R D, the bottom ones?

The second one from the top, "What direction"?

Q Not my copy.

A I have got it.

"Then the next time that this came up was when you were in the prison and you asked a guard about him."

Q Then there is an "R".

A Yes.

"Response, yes. I had been there. I am not sure whether it was four or five days, but I feel certain that he would have been captured or rescued, so I wasn't jeopardizing him and I asked the guard about him and he said, 'what is his name?' And I told him, and he said, I will check.' Then he was gone about five or ten minutes and he came back and said, 'He is here. He is luckier than you. He is uninjured,' and I said, 'Can I see him?' And he --" I don't know what the following statement means. It says here, which is kind of poor, because this does conflict with the statement in the summary -- it says, "I have learned since, I know that they, whether the statement is true or not, has no bearing on what they said or not and if they had any objective, whether trying to make me feel better or worse or whatever, but at the time I believe the guard was laughing or smiling like, you know, if he had been sly and seemed like a pretty straightforward answer."

Q All that was said by Captain O'Neill?

A Yes, I am sure a lot of this is badly typed.

Q Does the summary of facts and circumstances indicate anywhere that the guard told Colonel O'Neill that Captail Bosiljevac was uninjured?

A No, the summary says there the guard said "living, well uninjured and luckier than you."

Q He gave some details?

A Yes.

Q I want to direct your attention to the first page of that summary -- not the summary -- the debriefing, which is Plaintiff's Exhibit 17.

A Okay.

Q Now, you mentioned this before lunch, but I just want to point out where it is. Do you see the words, "Gunshot wound"?

A Yes.

Q Was this the point where you mentioned before lunch that you subsequently discovered it was supposed to mean "bail out?"

A About three or three and a half weeks ago I was reading the record, just to check for accuracy, and see if everything I knew to be existing was there, and I noticed in this sanitized version, which is not the complete version, was placed in the record and as I read down I found this statement. I think the best place to start is from where I read in the report, "After a gunshot wound you saw mike in the chute?"

Q Does the summary -- the summary of facts and circumstances discuss the possibility of your husband having survived after the crash, aside from the mention of the conversation with the guard?

A No, not that I can tell right here.

Q Is there any indication in the file concerning his having survived from the way in which he decended from the aircraft?

A Yes, there are indications in the file.

Q What are the indications?

A That he survived the ejection and, you know, that he was on the ground alive.

Q Was there anything in connection with the way he parachuted down?

A Yes.

While he was parachuting down, you have to get a mental picture of this, Colonel O'Neill was a thousand feet higher and he was a quarter of a mile away. Colonel O'Neill's parachute was -- all the strings were tied up and swilled around. He was balooning, rotating as he came down. My husband was not. He reached down, took a knife out of his pocket, opened it up and made a four line cut in the parachute rises. He cut them so that it would modify the chute. He also deployed the survival equipment, which does take manual effort, a kit that they sit on in the aircraft, which has a boat in it or something is deployed and the boat hangs out away from them.

Q Both the cutting of the lines and the deploying of the survival equipment required that the parachutists be alive?

A Definitely, the cuttings had to be done by him. There is no other way to do it.

Q Now, I wish to show you another document which is pulled from the file. I handed a copy to the Assistant United States Attorney, and I ask that a copy be marked as Plaintiff's Exhibit 18 in evidence.

THE CLERK: Marked Plaintiff's Exhibit 18 in evidence.

(Continuing) I show it to you, what is this?

A It is a little hard to read. I do not know what you call it. It is a message form.

Q Now, I want to direct your attention to a specific part of this message form. Specifically, the last paragraph.

A Okay.

Shall I read that?

This document is dated October 1, 1972.

Q Now, do you know in the last paragraph, five lines from the bottom, halfway through the line contains the words "the possibility". Would you read that?

A "The possibility of survival of Captain Bosiljevac is good, although no voice contact was made with Captain Bosiljevac, the possibilities exist that he landed safely in a secured area and is presently evading capture. Air Force Form 484 will be submitted on 6 October, 1972."

Q Going right up to the top, about the sixth line from the top, do you see the letters "FM" on the lefthand side?

A Yes, "From Korat Royal Thai Air Force Base, Thailand."

Q Between the letters, "FM" and the word "Korat" there are some notations.

A 388 -- looks like a zero -- SG.

Q Which squadron was your husband with?

A I know what that is. He was in the 388 Tactical Fighter Squadron.

Q That is who this message is from?

A It's been a long time.

Q I will show you another Air Force document, which I am handing to the Assistant United States Attorney, a copy of which I am asking be marked in evidence as Plaintiff's Exhibit 19.

THE CLERK: Marked Plaintiff's Exhibit 19.

THE COURT: Yes, go ahead.

THE WITNESS: Shall I go ahead?

MR. BRADLEY: Yes, about a third of the way down is a big black mark.

A Yes.

Q Dropping down four lines below that, to where it says "Reference the briefing report" it says "Returnee James O'Neill" and then it says "debriefing." Under that it says "Category one",what does it say after that?

A Category one: Personnel known by name and believed to be alive."

Q Then it says "name."

What name does it give?

A Michael J. Bosiljevac, nicknamed Mike, rank, Captain, branch of service United States Air Force."

Q Then it says "Last known status."

A "Alive and well in camp."

Q Then below that it says "Physical condition."

A "Good."

(Continued on next page.)

HS/JW
2PM2

THE COURT: I do not understand why we are going over and over the same points. All of this is based on what O'Neill got from that guard. I have a full file here. I will not permit it.

How long are you going to do this?

MR. BRADLEY: I'm about to end.

THE COURT: I will give you five minutes to complete your direct.

MR. BRADLEY: I can complete it in five minutes.

Q I want to show you a photograph, a copy of which I have given to the Assistant United States Attorney, the original of which I offer into evidence as Plaintiff's Exhibit 20.

THE CLERK: Marked Plaintiff's Exhibit 20.

Q (Continuing) Where did you first get this photograph?

A It was sent to me by Mike's cousin, who got it from a book that was published in Britain, entitled "Behind Barbed Wire by a J. Walker, and subsequently printed in the United States under the name of P.O.W.'s.

Q You have looked at that picture; is that correct?

A Yes.

Q Does any of them bear any resemblance to

Captain Bosiljevac?

A Yes.

Q Which one?

A If you go left to right, the second man.

Q The one --

A The one that is furthest in the back.

Q Obscured behind someone's shoulder?

A Yes.

Q Have you asked the Air Force to identify the people in that photograph?

A Yes.

Q Have they identified that individual?

A Yes, and all individuals in the photograph.

Q Whom did they say that individual was?

A A Jerome Herand.

Q Have you contacted Jerome Herand?

A Yes.

Q What did he say?

A He was quite nice and I asked him to please send me any propaganda information or any pictures that were taken of him while he was being used for propaganda purposes. He sent me a number of them and I asked him in the conversation if he could remember being in a configuration like this in a prison, giving a statement, and he said he could not remember anything like that.

Q Did he say whether that was him or not?

A He sent me a photograph of himself. Was an official Air Force photograph. As you can notice, these xerox copies are bad, but the nose on the man in this picture comes down close to his lip. Jerome Herand's nose is high on his face. Some of the other propaganda photographs that he sent to me, contained profile shots of him, which indicated the same thing.

May I mention something else?

Four nights ago another man, who is a good friend of my husband, was up at our home and I showed him this photograph. He said, "Whom did they identify those people as in the photograph?"

I said the one in the picture that was a problem was the second man from the right, identified as Melvin Matsui. He said, "That is not Melvin Matsui. I know Melvin Matsui. He is a very good friend of mine."

So I have some doubt about this -- serious doubt. I can't prove anything about it -- is there any reference to it in the file?

A Only that I sent a copy of it to the Air Force Casualty and Defense Intelligence inquiring as to who the people were.

Q In the file, do they indicate on what occasion that was taken?

A They said it was taken in December during a trip by Joan Baez and Taylor and there is a letter to that effect.

Q And that letter is in the file that Telford Taylor and others were at that press conference?

A It said it was taken during that time frame, while interviewing American pilots.

Q Now, I have one last document, a copy of which I am giving to the Assistant United States Attorney, the original of which I will ask be marked as Plaintiff's Exhibit 21.

THE CLERK: Marked as Plaintiff's Exhibit 21.

Q (Continuing) I direct your attention to this document. This is a letter dated September 7th; is that correct?

A Yes.

Q What is the purport of that letter?

A It is a response to my letter of August 21st, requesting information under the Privacy Act pertaining to my husband, Michael J. Bosiljevac, and it was my request received on August 24th, and their response:

"We are pleased to inform you that a number of records -- we are pleased to inform you that a number of reports relative to your request have been located by the Defense Intelligency Agency. However, unavoidable delay has been encountered in providing copies of those records. Further coordination is required by those elements contributing to or originating those records. To fully service your request, we have initiated action to expidite the review and a return of the subject records. We trust that you understand the necessity for these requirements and you will be notified upon completion of the review and the availability of all records located."

Q This letter is dated twelve days ago; is that right?

A Yes.

Q Have you yet received those reports?

A No.

Q You're still awaiting them; is that correct?

A I have for some time.

Q I would like to ask you a couple of wrap up questions:

What had been your role with the National League of Families of M.I.As?

A I have been a member of the Board of Directors for three years and I have served as the state coordinator for Nebraska, for the regional coordinator for the Midwest, including thirteen states and I have at one time been the national coordinator.

Q As a result of these activities, have you become familiar with other cases -- other M.I.As?

A Many, many other cases.

Q Have you become familiar with the experiences of the families relating to those cases?

A Yes, I have heard stories of extreme frustration from at least all of them.

Q What kind of frustration?

A Frustration for instance where parents have tried to read some of the things that I even find difficult to read in the records, which are very hard to understand. They have no concept of what they are, nor what they mean.

Q Have these families had difficulty obtaining the documents?

A Well, I do not know too many families that have been given this record at all. I know very few.

MR. BRADLEY: I have no further questions.

THE COURT: Any cross?

MS. BUCK: No questions.

THE COURT: Thank you very much.

MR. FOLEY: I call Mr. Brooks.

(Continued on next page.)

3PM-JB/flp
3-1

GEORGE L. BROOKS, called as a witness, being duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. FOLEY:

Q Mr. Brooks, will you put your address on the record, please?

A 16 Cresthaven Drive, Newburgh, New York.

Q Mr. Brooks, are you related to an M.I.A?

A Yes, I am.

Q Will you state what the relationship is and who he is?

A I am the father of Nicholas G. Brooks, Lt. Commander, U.S. Navy.

Q He is missing in action; is that correct?

A As of January 2, 1970 in Laos.

THE COURT: 1970?

THE WITNESS: '70.

THE COURT: Thank you.

Q In Laos?

A Yes.

Q At the time that he became first missing and for, say, during the year or two after that, were you furnished with information respecting his casualty and how it occurred?

A It was made known to the families that they could go to the Navy Office in Washington, D.C., and look at their relatives' records. And I did go down and take a look at his record.

Q Now, are you talking about the period, say, within the first year or two after the casualty occurred?

A Yes, sir.

All right. Do you have any records that would indicate the nature of the description of the casualty that you received at that time?

A Yes, I do.

Recently I sent to the Navy Department, and Commander Colgan forwarded to me, a transcript of his record.

Q Now, do you have a document now that would indicate what the state of the original version of the casualty was?

A Yes, I do have that.

Q May I have it please?

A That's amongst others, but --

MR. FOLEY: Your Honor, may I say, I have a difficulty with -- I was unable to get this document ahead of time and I therefore was unable to xerox it. I wonder if I may show it to the U.S. Attorney and --

THE COURT: Mark it.

MR. FOLEY: And I will undertake to have copies made.

THE COURT: Let me see it.

MR. FOLEY: I will, however, undertaketo get copies -- mark it.

THE CLERK: Document marked plaintiff's exhibit 22.

MR. FOLEY: May I have the exhibit, please? Excuse me, I will wait.

Q Mr. Brooks, I'd like you to look at this exhibit 22 and briefly state where in there the essential summary is of thecasualty event?

A The essential summary is in paragraph 3, I believe.

Q All right. Now, does that paragraph give any indication, or anywhere else in that exhibit is there an indication that your son wasknown to have arrived alive on the ground, or any facts you know relative to what happened to him after he came down?

A Not in this particular paper, no, sir.

Q At the time you say -- thinking back now from 19 -- say, 1970, when the casualty occurred, through, say, December of 19--say the Spring of 1974, just to pick a time, was there ever any time of any entry known to you in that record which would indicate whether or not your son had arrived safely on the ground at the time of his casualty?

A We have been notified by the service that subsequent information indicated that my son had survived to evade. This was from a sensitive, but reliable source.

Q When did you get that kind of information? Do you recall? Or can you approximate when you were told this?

A I would guess in 1974 sometime.

Q That was in 1974. But up to the Spring of 74, I am talking about?

A I don't recall the date. I am sorry.

Q To refresh your recollection, did you receive that information as a result of a meeting that you had with the Navy man at Omaha, Nebraska?

A That was -- it was partially due to that.

Q All right.

A Yes.

Q That's all I want for the moment.

That occurred, did it not, in the Summer of 74?

A Yes.

Q So now when I ask you, did you receive additional information up to the Spring of 74, I am talking about prior to the meeting which we will refer to as the Omaha meeting?

A Yes.

Q During that period of time, say, over three years, thebeginning of 70 through the Spring of 1974, was it always your understanding that the files that were maintained were the full and complete files on your son?

A That's true. I had gone to the Navy Department and asked to see my son's file. And this is what I had received.

Q Now, we made a reference to something that occurred in Omaha, Nebraska, in 1974. Is it true that the National League families had their annual meeting?

MS. BUCK: Objection.

MR. FOLEY: This is just background material. This is just background material.

THE COURT: Overruled. You may continue.

MR. FOLEY: We were supposed to be out of here at 3:30 and --

THE COURT: Please go ahead.

Q Is it true, then, that in the Summer of 1974, the annual meeting of the National League of Families occurred in Omaha, Nebraska?

A Yes.

Q While there did you receive some additional indication of information about your son?

A Yes, I did.

Q Will you please relate what that was?

A I -- at that time I met with my son's squadron commander. He started to relate the story to me how my son had been captured and tied to a tree and escaped. And they recaptured him and tied him to a tree. And later that night when they went to retrieve him, there were only the ropes there. So that it was a clear indication that, yes, he was alive and in good condition and had escaped on at least two occasions.

Q Now, did he tell you how he knew this? Did he give you any indication?

A He had seen the report of this. And he was my son's squadron commander. So he was very involved in it.

Q Are you saying he was privy to some report concerning your son, but a report that you had not seen?

A Certainly. I was shocked at the time to learn this information after so long a period of time.

Q During the annual meeting of the National League of Families, is it a fact that thefamily members have access to the files maintained in their respective MIA's?

A Yes.

Q During the Omaha meeting in 1974, did you inspect your son's records?

A No. I had not requested that the records be brought there because I had -- as far as I knew, I had seen the records and I had not been notified that anything had been added to it. So I saw no purpose in requesting that the Navy bring it to that meeting.

Q The last time prior to that that you inspected your son's records, was there any reference in it then to this business of surviving on the ground and escaping from capture twice?

A No, sir.

Q When you received this information, did you bring it to the attention of the Navy?

A It was a Captain Rush who was there as a Navy representative at the time. And he came seeking me out because the information was printed in a local news media, and Captain Rush was very very angry with both of the squadron commander and myself.

Q In other words, some local reporter heard the story and published it; is that correct?

A That's right.

Q Did you then request information about what the story was on your son, what additional information there was on him or anything like that?

A I don't think I requested -- I think Captain Rush after a couple of hours conversation between the three parties said that he certainly was going to follow this up and my wife and I would be apprised of the results of it in a very short period of time.

Q Now, the three parties being you and Captain Rush and this --

A My son's squadron commander.

Q Your son's squadron commander. I believe you said your wife was a party to that conversation also?

A At times.

Q Right.

A Yes.

Q Now, -- well, thereafter, how long did it take to get the additional information?

A Well, this was -- I don't recall what the month was. July or August.

Q July.

A July or August. August, I think it was.

July was the month of the meeting. And not hearing from the Navy Department, my wife asked for a meeting with the Secretary of the Navy. And after a long series of delays and pressure by a congressman, that meeting was finally granted. I think it was in September of the following year -- or January the following year .

Q So, in other words, you were not give any additional information relative to this data that had started to be developed at Omaha for another period of six months or so afterwards minimum until you had this meeting with Secretary Mittendorf?

A That's correct. Yes.

Q As a result of that meeting, did you get the additional information or any part of it?

A That started a series of events which made it possible or whatever for the squadron commander to write a letter to the Navy Department. And they continued to try to check it out. And finally it was admitted into my son's record.

Q Now, I'd like to ask youthis. Do you know of any way prior to the Omaha meeting when you received this information that you could have found out things like that if at that time they were having a status review of your son?

A No. This was pure happenstance. The first time that our organizationhad a meeting outside of Washington and low andbehold in the middle of the country-- and it just happened that my son's squadron commander happened to be there. It was just a series of chancy things that I learned of what happened to my son.

Q But if you were -- if you hadn't just had that kind of pot luck and had to face a status review with the record the way it was before that, is there any way that you know of that you could have developed this aspect of the records when you were trying to present the truth?

A Absolutely not.

Q Do I understand, then, starting in January of 1975, you started to get some additional information -- January or February after the meeting with Secretary Mittendorf?

A I didn't get any additional information. What the information was that I have already had gotten was then confirmed and placed in my son's record.

Q Merely confirmed the -- what you had learned in Omaha?

A Yes.

Q Did they add any details to it such as how this was found out or any evaluations of this information that you recall? Did they add that to your file?

A No, sir, They said they can't find any record of it, but they will take the word of a Navy four stripe bird. And I think they well should.

Q Now, once that was in the record, were you told at that time then by anybody that now at long last your record was complete?

A I don't recall ever being told that now at long last -- I just assumed that that is all I am going to get at this time.

Q Well, did you inspect the file at any time after say, 19--January of 1975?

A I had looked at the file on subsequent meetings in Washington and including this year.

Q Right.

That was the meeting we had this year in July in Washing

A Yes.

Q Now, up through that time, did you ever see anything in that file to indicate any additional sources of information that could or should be made available?

A Well, probably the most glaring example of difference was when I originally looked at the file it stated that my son's pilot had been killed by thefall of a broken neck and other injuries. And then later after hearing reports that there were classified files that we were not seeing, my wife was in Washington on one occasion for some congressional hearings and she took the occasion to go over to the Navy Department and said, I want to see my son's classified file. Not even knowing that there was such a file. And they brought out a file. And we were amazed to find out then that this same man who supposedly had died of a broken neck from this fall. This was in an eyewitness account because a man was on the ground trying to retrieve him. Now the man was killed by -- with an AK47, which is a Chinese rifle, by a guard. And the report specifically states then and only then did he die, which is completely contrary. Now the man has died of two different types of casualties.

(continued next page)

JB:RMG
3PM/2
1

Brooks-direct

Q At that time, then, it was then that you learned for the first time that now that now there was yet another file on your son when you asked for it, a classified file, and you were handed one?

A Yes, sir.

Q Are you acquainted with the family of this pilot that you just discussed?

A I only met them on one occasion.

Q Do you know whether or not they were ever told either of these stories about dying of a broken neck when he fell to the ground and then subsequently being shot by a guard when he was alive on the ground in an incident which was described as saying then and only then he died? Do you know whether his family knew anything about any of this?

A I don't believe that they did. And I didn't feel it was my place to let them know if they had not gone to Washington.

Q What is his status today?

A His status has been changed to KIA, which was the original recommendation of the people on the scene at that time.

Q And now, he was -- he has been declared dead? There has been a determination of death in this case?

A Yes.

Q Was he in missing status before that?

A Yes, he was.

Q Do you know in his case whether or not that was one of those cases where a determination was made after a waiver of rights by a next-of-kin?

A I don't know the details of it.

Q Do you know whether or not his family for purposes of protecting his interests were equipped with the same information that you now have described you acquired over the years?

A I doubt -- well, I shouldn't say that. I don't know.

Q After you had the interview in Washington in which you -- you or your wife reviewed this classified file and learned these new facts, did you get any documents, any copies of documents from that file or -- let me change the question.

Did you request any documents from that file?

A I requested the file about three or four weeks ago. I didn't know the families could obtain the file. And I have a complete copy of what is in this file.

Q Now, in addition, is this the same file -- no, no. Correction. Strike that. I am going to put it this way.

In the course of Congressional hearings, did you learn of a file on your son that was maintained by any other agency of the Government apart from the Department of the Navy?

A Yes, sir, I did. I found recorded in one of the booklets of the Selected Committee which was established supposedly as a investigation of Missing In Action, Southeast Asia, on one page is stated that there were files turned over to the Selected Committee by the Central Intelligence Agency on five instances involving nine men.

MR. FOLEY: I wish to have this exhibit marked.

THE COURT: Mark them in evidence.

THE CLERK: Marked plaintiff's Exhibit 23.

Q Mr. Brooks, I have just given you an exhibit which appears to be copies of pages 134, 215 and 217 from some booklet somewhere. Is this the reference you're speaking about to your son?

A Yes, sir, it is.

Q Can you tell us where on that page -- on that exhibit the reference is to be found?

A On page 217, the last name, and in the list of instances which is designated here in this page as part three.

Q Now, that's the -- to condense things, do I understand it, that that is a list of instances as to which there is a CIA file?

A Yes, sir.

Brooks-direct

Q All right. Now, have you sought to obtain -- strike that, please.

Prior to reading this here, were you aware that there was a CIA file on your son?

A I had no knowledge whatsoever. No hint of any knowledge that there was any kind of a CIA file on my son.

Q Have you sought to obtain a copy of the CIA file?

A I requested it under the Freedom of Information Act from the Central Intelligence Agency.

Q When did you make that request for that information under the Freedom of Information Act?

A March 9, 1977.

Q Now, that was March 9th of 1977?

A Yes.

Q Do I understand it correctly that was about seven months ago that you made that request?

A Yes, sir.

Q Have you received the documents that you requested during that seven month period yet?

A No, sir.

Q Have you received a rejection yet?

A No, sir.

Q So it's -- it's neither way so far; is that correct?

A That's right.

MR. FOLEY: May I have a copy of your Freedom of Information demand, please?

THE COURT: What is the situation here? The documents are in the CIA file?

MS. BUCK: Your Honor, perhaps Commander Colgan is more familiar with it or Captain Vohden can explain the situation.

THE COURT: Well, Captain, what is the situation?

CAPTAIN RAYMOND VOHDEN: I will tell you, Sir, I really don't know the security system, how this works. But I would be happy to discuss this with you in private.

THE COURT: I don't want to --

MR. FOLEY: No, I object to that.

THE WITNESS: There's been too much privacy about my son already. I would like to hear the truth.

MR. FOLEY: Please --

THE COURT: Just be quiet, please.

Captain, all I want to know is, are there documents that you know about relating to this man in some file?

CAPTAIN VOHDEN: Sir, I do not know.

THE COURT: Would you have been advised of this?

CAPTAIN VOHDEN: Not necessarily. There are many men like Mr. Brooks. Twenty-five hundred. And we get documents from time to time from the CIA. And that goes to the Defense Intelligence Agency. And as far as I know that is the final Intelligence depository for these people.

MS. BUCK: I have Commander Colgan here.

THE COURT: Yes, Commander.

COMMANDER JOHN C. COLGAN: I am a custodian of Lt. Cmdr. Brooks' files. And I cannot answer if there is a file in the CIA. I don't know. I deal with the Defense Intelligence Agency and I have gone through Mr. Brooks' file of his son at the Defense Intelligence Agency page by page with Congressman Gillman during the hearings of the selected men.

THE COURT: What is the situation? What is the best information with respect to what happened with this young man?

COMMANDER COLGAN: The best information that happened -- I have information from Captain Ditmar, and he -- when he wrote a letter -- and it was his impression that he first gave the information to Mr. Brooks, and that Mr. Brooks related in his testimony today, that he first provided him with that information and the National League Families Convention in the summer of 1970, and there is a statement in the file about this from --

THE COURT: What is your best information as to what happened to the young man at the time in question?

COMMANDER COLGAN: All right. We have had the Intelligence report shortly after the shoot-down, the files here on the table. I think it was about 16 days, and at that time it was --

THE COURT: Do you have the file here?

COMMANDER COLGAN: It is on the classified --

THE COURT: Let me have the file.

MR. FOLEY: Is it complete?

COMMANDER COLGAN: The file is complete.

THE COURT: All right, mark it in evidence.

THE CLERK: So marked plaintiff's Exhibit 24.

THE COURT: Have you ever seen the file?

THE WITNESS: I don't what file it is, your Honor.

THE COURT: Well, let's take a look at it.

COMMANDER COLGAN: On the inside cover there is one confidential document that is removed from that file and that is Lt. Cmdr. Brooks' personal authenticator in case he were found and challenged his reply. I have gone through that privately with Mr. Brooks. But without revealing the contents, that has to be removed and that has to stay as a confidential document.

THE COURT: Is it in there?

COMMANDER COLGAN: No. I removed that.

THE COURT: Well, that is not significant.

MR. FOLEY: For the sake of clarity, on the record I will just --

THE COURT: Excuse me. As I understand it, the CIA is involved because they were involved Laos.

COMMANDER COLGAN: No, Sir, I can't say. I am completely out of order on this. I can't speak for the CIA. I don't know.

THE COURT: How do you know there is a CIA file?

MR. FOLEY: It's in the Montgomery report. It's listed in his name on their records. Not that I am going to chalk this up as a great authority, but --

COMMANDER COLGAN: This is 183 POW files. If there is a document in our file and it has CIA markings I go the Defense Intelligence Agency and request that they take care of it. What their procedures are to contact --

THE COURT: But, you know, there is nothing in the CIA file that you saw.

COMMANDER COLGAN: No, Sir. The only Intelligence report that refers to the man -- this is the AK 47 -- being killed, the man on the ground, came from Naval Intelligence. That was signed by Admiral Harlfinger in 1970. And that is in that file right there.

THE COURT: All right. Will the Government attorney please check with the CIA and see what they have.

MS. BUCK: Yes. I would like to point out that the document that Mr. Foley submitted refers to the CIA file on five instances, but does not identify Mr. Brooks.

THE COURT: All right, why don't you check --

MR. FOLEY: Hold it. The next page. The bottom of that tabulation, the last name.

THE COURT: Check with the CIA. Let's see if they have anything.

All right, anything else?

MR. FOLEY: Slightly more.

Q Mr. Brooks, is it your sworn testimony that --

A Wait a minute. There is a lot more in this file in what was supposed to be a copy of summons --

THE COURT: All right. Sit down and look.

MR. FOLEY: I would like that on the record.

THE COURT: You can look at it.

MR. FOLEY: I will finish up.

Q Mr. Brooks, is it your sworn testimony that prior to the Omaha meeting in 1974, you had not received the testimony which in unsworn statements to the Court now it was just indicated you got it in 1970 --

THE COURT: Do you want this witness to --

MR. FOLEY: We will get to this later.

THE WITNESS: No, Sir. I would like to explain it in this manner. When Captain Ditmar started to explain this to me about how Nick Brooks was captured and tied to a tree, I let him go on. And then I took him by the shoulders and I said, Lou, are you sure you're talking about Nick Brooks?

He asid, yes. Didn't I tell you this in Washington?

I said, you told me that about my son, how could I possibly have forgotten it.

He said, I am sorry.

And then went on to relate the story. So I am sure if it would have been your own son you wouldn't have forgotten the story either.

Q I am sure nobody would.

THE COURT: All right, anything further?

MR. FOLEY: Very little.

Q Mr. Brooks, could you conceive of any way in which you could effectively represent your son under the facts of his case without having the information which it now seems is available as a result of what happened in Omaha and as a result of the CIA file that we are beginning to learn about, and about the results of the classified file your wife found in Washington?

A I would go in there only prepared with what the Service -- and I am not criticizing the Service. I have always had a very good relationship with the United States Navy, which is the best of all the Services. And I regret that I am here in Court today in this particular instance, but I am fighting for the life of a man. Many men are being killed and --

Q All right. Let me ask you this. Without access to those files which are gradually becoming available, can you represent your son or do anything for him?

A I feel inadequate to represent him with the information that I have at my command.

(Continued on next page.)

Q Inasmuch --

THE COURT: Excuse me. What is your position? Would you represent --

MR. FOLEY: He doesn't know.

THE COURT: Is there a wife or what?

THE WITNESS: No sir.

MR. FOLEY: No wife, no dependents.

THE COURT: So you are the next of kin?

MR. FOLEY: He would be.

THE WITNESS: I am his father.

MR. FOLEY: Technically, the -- for the record, may I say the technical -- the term, primary next of kin, has changed definitions over the years since these guys were shot down. It is a very, very tricky odd business. But he is now the one who would do it.

THE COURT: Is your son still missing in action?

MR. FOLEY: Yes.

THE COURT: So far as their records.

THE WITNESS: Yes sir. In all indications that he is alive, Judge.

THE COURT: Well --

MR. FOLEY: Okay.

THE COURT: You happen to be notified of the

THE WITNESS: No. They are doing that in chronological order. My son having been missing in 1970, they haven't gotten up to his date.

THE COURT: When you are notified, are you going to ask for a hearing?

THE WITNESS: I certainly will. Otherwise I would be abrogating his rights.

THE COURT: All right. You have the file. You can look at it.

MR. FOLEY: All right. Well, the difficulty, I may add, your Honor --

THE WITNESS: The CIA file, which I can't get -- I don't know what that contains.

THE COURT: But if there is one you will look at it.

MR. FOLEY: If I may just on the record say this, your Honor. The difficulty is that every year there is a new file and you think you have it. That's our biggest problem. Not just his. It's everybody's.

THE COURT: All right.

Q Now, Mr. Brooks, can you -- do you recognize the term USSDP account?

A Yes sir.

Q All right. For -- rather than see you get mixed up on what it means, does it mean, uniform services savings deposited program?

A Right.

Q Does your son -- can you describe that program?

A Well, all of my son's money -- I am not a depositor of my son. His money goes into the account which he will collect on his return. In the meantime that accounts collects, as I understand it, ten percent interest. I have just gotten an accounting of his money.

Q All right. Hold that and we will get to it.

(Continued on next page.)

Brooks-direct

BY MR. FOLEY: (Cont'd.)

THE COURT: We have them saying they're beginning to give them back --

MR. FOLEY: That's what I'm going to point out which is not so.

Q The money in the U.S.S.D.P. account, do I understand you to testify, that the funds on deposit in that savings account earn income-interest at the rate of ten per cent annum.

A Yes, that's my understanding.

Q Are you aware -- strike that.

Can you tell us whether or not the amount of accumulated interest in a U.S.S.D.P.K. is of a significant amount in the case of your son's case.

THE COURT: I understand all of this. Let's move ahead.

MR. FOLEY: Judge, if you can give me until 25 to 4:00, I'll be finished with this witness.

THE COURT: Ask your final question.

MR. FOLEY: This is it, this line is it.

Q Would you please give me the account you have here?

(A document is handed to Mr. Foley.)

THE COURT: Mark it in evidence.

MR. FOLEY: Your Honor, this is this man's only record of this. I would request an opportunity to substitute the exhibit.

THE COURT: You may.

THE CLERK: Plaintiff's Exhibit 25 in evidence.

xxx (So marked)

BY MR. FOLEY:

Q Mr. Brooks, can you give me the date of that account?

A 24 August, 1977.

Q What does it indicate is the accumulated assets of your son?

A $182,960.22.

Q How much of that is accumulated interest which was earned in this U.S.S.D.P.K account?

A $53,508.90.

Q That would continue to grow at ten per cent per year on past money and future money and on the accumulated interest itself, is that correct?

A Yes, sir.

MR. FOLEY: Your Honor, those are all the questions I have.

THE COURT: Any cross-examination?

MS. BUCK: No, your Honor.

3 THE COURT: Thank you very much, sir. I'm sorry to hear about your sone.

THE WITNESS: Judge, there are many men still alive, that's why we're here today. They should not be presumed dead by anyone.

THE COURT: We don't know that.

(Witness excused)

THE COURT: We'll have to conclude for the afternoon.

MS. BUCK: There's one further matter, the TRO ran out. The Government moves at this time --

THE COURT: I'm going to renew it for the duration of the hearing unless you have an application with respect to specific cases.

MS. BUCK: It's not the specific cases so much. It's that letter sent to you this morning and the affidavits that we have submitted that women do want these reviews, but not placed in the untenable position of not having asked for them.

MR. FOLEY: I resent this.

THE COURT: Please don't interrupt.

MR. FOLEY: I'm sorry.

THE COURT: We'll try to move ahead as quickly as we can on what we decided. I'll do the best I can with the limited resources I have. I have people waiting in chambers. I can't continuously go on.

We have a jury case tomorrow which I hope to send to the jury by 12:00 o'clock or so. I suggest you come in at 1:00 and we'll continue the day as much as we can. We'll have to take breaks for other cases from time to time.

How long is your case going to continue?

MR. FO[illegible]'m almost through. I'll look at a few things [illegible]ight. That's one of the thing I'll do.

THE COURT: Make your position at the end of the case.

Goodnight everybody. I really apologize, Madam, for the difficulty you had on the stand. I really feel badly.

(Time noted 3:30 p.m.)

***

INDEX

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Dermot G. Foley	5	26		
Bessie Sue Wallace Sullivan	29			
John M. O'Grady	31			
Mary Kathleen Veys Bosiljevac	37			

EXHIBITS

GOVERNMENT	DESCRIPTION	FOR ID.	IN EV.
1,2,3	Documents		22
4	Document		34
5	Document		34
6	Document		40
7	Document		43
9	Document		52
10	Document		54
11-Aand B	Document		59
12	Document		62
13	Document		64

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss..

RICHARD MARVAS, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 127 SECOND AVE NEW YORK, N.Y.

That on the 30 day of DECEMBER, 1977, deponent personally served the within JOINT APPENDIX VOLUME I OF II upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 1 true cop~~ies~~y of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

DAVID G. TRAGER
United States Attorney, Eastern District of New York
Attorney for Defendants-Appellees
225 Cadman Plaza East
Brooklyn, New York 11201

Richard Marvas

Sworn to before me this
30 day of December 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930008
Qualified in Queens County
Commission Expires March 30, 1979